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No. 88-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

88-5276

DUNCAN PEDER McKENZIE, JR.,

Petitioner,

v.

JACK McCORMICK, Warden, Montana State Prison, and
MICHAEL GREELEY, Attorney General of the State of Montana,

Respondents.

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner Duncan Peder McKenzie, Jr., through his undersigned consel, hereby moves this Court for leave to proceed on his Petition for Writ of Certiorari in forma pauperis, without prepayment of costs and fees.

Petitioner has been indigent at all stages of the state and federal proceedings in this case. In the District Court and the Court of Appeals below, counsel was appointed to represent Petitioner under the Criminal Justice Act, 18 U.S.C. §3006(A). Affidavits establishing Petitioner's indigence were filed in the courts below. The appointment of counsel should permit Petitioner to proceed in forma pauperis "without filing the affidavit required by Section 1915(a) of Title 28." 18 U.S.C. §3006(A)(d)(6).

DATED this 8 day of August, 1988.

Respectfully submitted,

Timothy K. Ford
Attorney for Petitioner

Supreme Court, U.S.
FILED
Aug 9 1988
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JACK McCORMICK, Warden, Montana State Prison, and
MICHAEL GREELEY, Attorney General of the State of Montana,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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600 Pioneer Building
Seattle, WA 98104
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COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the number and pervasiveness of jury instructions which unconstitutionally shift the burden of proof to the defendant in a criminal case, is "irrelevant" to the issue of harmless error.

2. Whether unconstitutional jury instructions can be held harmless error, by an appellate court's determination that the jury could have ignored them and found against the defense on the disputed mental issues by utilizing other instructions.

3. Whether jury instructions which contain conclusive presumptions, wholly withdrawing from the jury's consideration statutory elements of the offense, can ever be held to be harmless error.

4. Whether the Eighth Amendment is violated when a state trial judge imposes a death sentence after trial, although the same judge agreed, before trial, to impose a prison sentence for the same crimes upon a plea of guilty.

5. Whether the Eighth Amendment is violated by a state trial judge's decision to impose a death sentence, premised on a finding that there there were "no" mitigating circumstances, entered without regard to uncontroverted testimony that the defendant suffered from mental defects resulting from childhood deprivation.

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No. 88-_____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Duncan Peder McKenzie, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The majority and dissenting opinions in the United States Court of Appeals for the Ninth Circuit En Banc, which are officially reported as McKenzie v. Risley, 842 F.2d 1525 (9th Cir. 1988)[1], are annexed at Appendix A-1-49. The opinion of the panel of the Court of Appeals which first decided the case there, is reported at 801 F.2d 1519, and annexed at Appendix A-50-62.

The opinion of the United States District Court for the District of Montana, Billings Division, which is unreported, is annexed as Appendix B.

---

[1]Since submission of the Briefs in the Court of Appeals, Henry Risley has been replaced by Jack McCormick as Warden of the Montana State Prison.

JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1988. A timely motion for rehearing was denied on May 10, 1988. A copy of the Order Denying Rehearing is annexed as Appendix C. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury;

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or [shall cruel and unusual punishments be] inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves several now-repealed statutory provisions of the law of the State of Montana, which are set forth in Appendix D.

STATEMENT OF THE CASE

Duncan Peder McKenzie, Jr. is under a death sentence imposed by Montana District Court Judge R.J. Nelson, for killing Lana Harding in rural Pondera County, Montana, in January, 1974. Mr. McKenzie's was the first major prosecution under the 1973 Montana Criminal Code, the provisions of which later produced Sandstrom v. Montana, 442 U.S. 510 (1979). His was also the only death sentence under the 1973 Montana capital sentencing statutes, which were later amended in light of Furman v. Georgia, 408 U.S. 238 (1972).

1. The Charge.

Mr. McKenzie was tried on the fourth amended information filed against him by the Pondera County Attorney.[2] St. Ct. File Item No. 74.[3] This Information divided the single offense against Ms. Harding into seven counts: two counts each of "deliberate homicide" and "aggravated kidnapping;" one count of "sexual intercourse without consent" and two counts of "aggravated assault". Ibid. The homicide counts included five different alternative allegations; all had in common the statutory mens rea element of deliberate homicide: "purposely or knowingly causing ... death."[4]

---

[2]The first three informations against Mr. McKenzie were dismissed, because of various legal defects. See State ex rel. McKenzie v. District Court, 525 P.2d 1211 (Mont. 1974).

[3]Throughout this Petition, the state trial transcript is referenced as "St.Tr."; state court file documents are referenced as "St. Ct. File Item"; and documents in the District Court record are referenced to the Clerk's Record ("CR") or by exhibit number ("H.Exh.").

[4]Slightly abbreviated, these counts read as follows:

> Count I: That DUNCAN PEDER MCKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being; in violation of Section 94-5-101 and Section 94-5-102 R.C.M. 1947.
>
> Count II: That DUNCAN PEDER MCKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being, while the said DUNCAN PEDER MCKENZIE, JR. was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit:
>
> 1. SEXUAL INTERCOURSE WITHOUT CONSENT, ... by knowingly having sexual intercourse with the said LANA HARDING, ... without consent, ... or
>
> 2. AGGRAVATED ASSAULT, ... by purposely or knowingly causing ... Serious bodily injury ... or ... bodily injury to said LANA HARDING with a weapon, ... or ...
>
> that the said DUNCAN PEDER McKENZIE, JR. committed the crime of DELIBERATE HOMICIDE, a felony, as above alleged, by purposely or knowingly causing the death of the said LANA HARDING:
>
> 1. by mean [sic] of torture; or
>
> 2. by lying in wait or ambush;
>
> in violation of Section 94-5-101, 94-5-102, 94-5-503 and 94-5-202, R.C.M. 1947.

St. Ct. File Item 74; see App. A-32-3.

The two counts of "aggravated kidnapping" similarly described a variety of alternative acts constituting that crime, each of which they alleged was committed "knowingly or purposely". Appendix A-32-3. They also contained an allegation that "Lana Harding ... died as a result of said criminal conduct." Ibid. The remaining three counts charged the lesser offenses of sexual intercourse without consent and aggravated assault, in similarly alternative forms. Appendix A-33. Again, each of these offenses contained an allegation of a mens rea element of "purposely" or "knowingly" causing the specific forbidden result. Ibid.

2. Pretrial Proceedings.

From the outset of the case, Mr. McKenzie's counsel made clear they intended to put the State to its proof on the mental elements of the offense. They gave written notice to that effect (St. Ct. File Item 40), and they repeatedly sought from the trial court a ruling that the State "has the burden of proof, at trial, to prove beyond a reasonable doubt, that defendant had and could have had the requisite state of mind which are elements of the various crimes charged herein." Motion, St. Ct. File Item 88.[5] These motions were denied, the trial court repeatedly holding that the defense had the burden of proof on this issue.[6]

---

[5]See also Notice, St. Ct. File Item 40; Motion for Bifurcated Trial, St. Ct. File Item 134; Motion for Dismissal, St. Ct. File Item 135; Motion to Require Proof of Ability to Have Particular Mental State, St. Ct. File Item 143.

[6]See St. Ct. File Item 90; see, e.g., St.Tr. 1371. The following exchange was typical:

> MR. REAGAN [defense counsel]: The State has the burden of proof to prove that he had the requisite mental intent under 95-502 prior to the closing of their case-in-chief. If they fail to do this, we have a right to a directed verdict of acquittal.
>
> THE COURT: That he could have had.
>
> MR. REAGAN: Right.
>
> THE COURT: Overruled, denied--and another record on that has been made and made and made.

St.Tr. 1434-35.

Despite the fact that Mr. McKenzie's counsel declined to give the statutory notice of the defense of "mental disease or defect excluding responsibility"--Montana's then-equivalent to an insanity defense (see, e.g., St. Ct. File Item 40)--in September, 1974, the District Court ordered Mr. McKenzie to a state hospital for the first of two psychiatric examinations. St. Ct. File Item 75; see also St. Ct. File Item 138, St.Tr. 2102-6.

After he returned, on December 4, 1974, venue was changed from Pondera County to nearby Cascade County, Montana, due to extensive local publicity. St.Tr. 3. On December 17, 1974, Mr. McKenzie was arraigned. At arraignment, Judge Nelson set the case to begin January 8, 1975, and announced he would give the jury extensive "preliminary instructions" on the law. St.Tr. 20, 58. Both sides objected to these instructions on the grounds they were erroneous as a matter of law and violated the defendant's constitutional rights.[7]

3. The Plea Agreement.

Over the next few days, the two defense counsel and two County Attorneys began intensive plea bargaining discussions. FF 13, CR 109.[8] The County Attorneys initially took the position that any agreement had to be approved by the victim's family before it was presented to the Judge; but later abandoned that precondition. FF 16. The Court of Appeals summarized what transpired then, as follows:

> On Sunday, December 22, 1974 ... the prosecution and defense counsel reached a tentative agreement permitting McKenzie to plead guilty to two of the charged offenses in exchange for receiving a 50 year sentence. On the following day, counsel for McKenzie and the State met with the trial judge who reluctantly

---

[7] See St.Tr. 21-57; St. Ct. File Items 93, 100. The defense and prosecution objections made many of the same points. Notably, they both included specific objections to the court's extensive instructions on "presumptions", and they both noted that the court was instructing the jury on a non-existent crime, which the court called "deliberate homicide by means of torture."

[8] The facts regarding these discussions, the plea agreement that came out of it, and the prosecution's ultimate withdrawal from that agreement, were all the subject of an evidentiary hearing in the District Court below. The citations supporting the brief discussion of these facts in this Petition are to the findings the District Court below entered after that hearing. CR 109.

> approved the proposal and set December 30 as the date to receive the plea. On the evening of December 23, the attorneys met again and defense counsel left the meeting believing that a final binding agreement had been reached. The prosecutors, on the other hand, had the impression that the plea agreement was contingent on obtaining the approval of the victim's family. That contingency was not satisfied and on December 28 the prosecution advised defense counsel that there would be no deal.

Appendix A-12. Defense counsel moved to enforce the agreement, but Judge Nelson denied that motion, and denied a defense motion to disqualify him because of his involvement in plea bargaining. FF 22-3; St.Tr. 12/30/74 at 6, 11. The case went on to trial.

4. The Trial.

The trial began on January 8, 1975. After the jury was sworn[9] and the prosecution gave its opening statement, the trial court gave its "preliminary instructions" to the jury.[10]

a. The Preliminary Instructions to the Jury.

The court's "preliminary instructions" included the only definition of the presumption of innocence and the requirement of proof beyond a reasonable doubt the jury heard during Duncan McKenzie's trial.[11] They also contained definitions of the mental elements of the offenses charged, which accorded with the definitions under Montana law:

> 10. Purposely Defined:
> A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or cause that result. ...

---

[9] On the day jury selection began the prosecution endorsed 58 additional witnesses, FBI experts and witnesses to establish the chain of custody over Mr. McKenzie's pickup truck, the source of much of the State's evidence. FF 33. Although Mr. McKenzie's lawyers objected and informed the court that the need for these witnesses had been revealed to the prosecutors as part of the broken plea bargain (St.T. 91)--which the prosecutor essentially admitted (St.Tr. 81)--the trial court permitted them to be endorsed and called (St.Tr. 91).

[10] The court gave only the first 28 of its proposed "preliminary instructions" before trial; the remainder were given as "additional instructions" at the close of the case. The full text of all instructions given the jury is set forth in the Appendix to the dissenting opinion in the Court of Appeals, which appears at Appendix A-30-49 to this Petition.

[11] Prelim. Instr. No. 7; Appendix A-34. Notably, the definition of reasonable doubt in this instruction contained no reference to doubts arising from the lack of evidence supporting the charges.

11. KNOWINGLY Defined:
A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

12. Intent Defined:
Intent is a state of mind importing conscious purpose, aim or decision.

Appendix A-34-5. They also defined the crimes with which Mr. McKenzie was charged--deviating significantly at one point from the definitions in the charging document, and the Montana statutes.[12]

b. The Evidence.

The prosecution's case consisted of a mass of circumstantial evidence connecting Duncan McKenzie to the killing of Lana Harding. See Appendix A-3-4. Its evidence of intent was primarily circumstantial, as well, inferred from the severity of Ms. Harding's injuries. The only direct evidence of Mr. McKenzie's intent came from several witnesses, who testified that he had made statements expressing a sexual interest in "country school teachers" in general and Ms. Harding in particular. St.Tr. 1897, 2054.

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[12]Notably, the instructions gave this definition to "deliberate homicide by means of torture":

> Whoever purposely assaults another physically for the purpose of inflicting cruel suffering upon the person so assaulted for the particular purpose of enabling the assailant to either:
> (a) extort anything from such person;
> (b) or to persuade such person against his or her will, or
> (c) to satisfy some other untoward propensity of the assailant,
> and in so doing the assailant causes the death of the person he assails, in the law is guilty of the offense of Deliberate Homicide by Means of Torture, whether or not it was the purpose or intention of the assailant to cause such death.
> "Untoward Propensity" means any perverse, wrong, bad or corrupt inclination or tendency.

Prelim. Instr. No. 23, App. A-36. The statement that a "purpose ... to cause ... death" need not be found to convict of deliberate homicide, which was repeated at the end of the trial (Add. Instr. No. 36; App. A-42), contravened the charging document (see note 4, above), and Montana law. See State v. McKenzie, 608 P.2d 428, 476 (Mont. 1980) (dissenting opinion of Justice Shea); R.C.M. 1947 §94-5-105 (1974).

The principal defense at trial focused on Mr. McKenzie's mental state at the time of the offense.[13] The key defense witness was a psychiatrist, Dr. Robert Wetzler. Dr. Wetzler was a specialist in psychiatry and neurology, in practice for over thirty years, a diplomate of the American Board of Psychiatry and Neurology, a fellow of the American Psychiatric Association, a Professor of Forensic Psychiatry, and a consultant to numerous governmental boards and agencies. See St. Tr. 2236-2241. He had examined Duncan McKenzie for four to six hours shortly after his arrest, and for six hours on another occasion, and reviewed eight hours of tapes recordings regarding Mr. McKenzie's background and the case. See St. Tr. 2244.

Dr. Wetzler testified that Mr. McKenzie suffered from a "schizoid personality," St.Tr. 2247, a "mental disease" which he exhibited "[t]o a marked degree, severe degree ..." St.Tr. 2570, 2579. Because of this mental disease, Dr. Wetzler testified Mr. McKenzie was unable to conform his conduct to the requirements of the law, unable to appreciate the criminality of his conduct (St.Tr. 2321), was not capable of possessing the mens rea elements of the crimes charged, as defined in the court's instructions (which he had reviewed), and did not possess them. St.Tr. 2578, 2581. His testimony went to the ultimate issue of the existence of the mens rea required by statute: "I do not feel that he was aware of what he was doing." St.Tr. 2578. "[O]nce they started ... or the chain of events occurred, ... then he had no control. He didn't know what he was doing ..." St.Tr. 2261.

The State called two witnesses to rebut Dr. Wetzler's testimony, Dr. Miguel Gracia and Dr. Edward Shubat, both from the Warm Springs State Hospital. Both agreed that Mr. McKenzie suffered from personality disorders, but disputed Dr. Wetzler's conclusions with regard to their effect on his ability to form the mental elements of the crime. St.Tr. 2396, 2547. The

---

[13]The defense also sought to raise doubts about the sufficiency of the State's proof that Mr. McKenzie was the perpetrator of the crimes. See App. A-7 n.9.

defense challenged both these doctors' qualifications and the bases for their conclusions.[14]

c. The "Additional Instructions" to the Jury.

At the close of the evidence, the court gave the jury extensive "Additional Instructions." The principal focus of these instructions was on the various methods by which the State could establish the mens rea elements of the crimes charged.

The first of these instructions was sweeping in its scope:

> The knowledge or purpose with which an act is done is manifested by the circumstances connected with the offense and the sound mind of the accused. All persons are of sound mind who are not afflicted with a disease or defect of the mind which excludes responsibility for their conduct.
>
> Upon the trial of the issues raised by the plea of not guilty to the charge made by the information, the defendant is presumed to have been free from any disease or defect of the mind which excludes responsibility for his conduct at the time the offenses are alleged to have been committed and to be sane now.

Add. Instr. No. 30; Appendix A-38. Later instructions focused more specifically on the mental elements of "knowledge" and "purpose" required by the various charges in the case, as to which the court told the jury "proof ... is permitted by indirect or circumstantial evidence, which means proof by rules of law, denominated inferences and presumptions." Add. Instr. No. 31; Appendix A-38.

Several of these instructions included detailed examples of the specific "inferences" and "presumptions" the jury could use to deduce the defendant's guilt. Typical was this hypothetical "example," captioned "Proof by Presumptions of Law (Deductions which the law expressly directs to be made from particular facts)":

> The witness heard a cry for help. He immediately looked out of a window and saw only two men; "A" holding a board and standing over the body of "B" who was unconscious on the ground and with his head

[14] One of the experts, Dr. Gracia, had only one year of accredited psychiatric residency and had failed a licensing examination for foreign medical graduates (St.Tr. 2393, 2523). Dr. Gracia also admitted his interview with Mr. McKenzie was incomplete because it did not go into the facts of the alleged incident itself. St.Tr. 2397. The other expert, Dr. Shubat, testified only to his "diagnostic impression," and admitted some of his test results were invalid (St.Tr. 2540) and that he, also, lacked sufficient information for a full diagnosis (St.Tr. 2544-45).

> bleeding. Other evidence was introduced to show that the board then held by "A" had blood on it which was the same type as "B's" blood and evidence was introduced that "B" had been struck on the head three times by the board to show that the striking was not accidental. No evidence was introduced as to a motive for "A's" striking "B" and no evidence of threats by "A" against "B" was introduced.
>
> If the jury believes the witness and the other evidence introduced they are permitted to deduce or reason that "A" struck "B" over the head with the board intentionally and for the purpose of injuring him but in addition thereto the law presumes, that is, the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act.
>
> Having found that "A" struck "B" over the head with a board three times, intentionally (absent any evidence that the act was in self defense by "A"), "A's" act was unlawful and the jury is expressly directed to reason that "A" struck "B" with an unlawful intent; that is, knowingly or purposely and is further expressly directed to reason that he intended to inflict the injuries that ordinarily result from such an act.
>
> There are other legal presumptions besides those referred to in the foregoing illustration and you will be instructed with particularity as to the use of inferences and presumptions as they may have application to each Count with which the defendant is charged.

Id., Appendix A-39.

The instructions promised in that last paragraph specifically focused in on the manner in which the jury could find the defendant was guilty of the particular crimes charged. This was the instruction on "Proof of Mental State by Presumption" of "deliberate homicide":

> [I]f you find beyond a reasonable doubt that the defendant ... voluntarily committed an illegal act on Lana Harding, such as assaulting or injuring her, the law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose. This is a rebuttable presumption, which means it may be controverted and overcome by other evidence ....
>
> The law also presumes that a person intends the ordinary consequences of his voluntary acts.
>
> Therefore, if you find beyond a reasonable doubt that the defendant ... voluntarily and unlawfully assaulted or injured Lana Harding, and if you find beyond a reasonable doubt that the death would result as an ordinary consequence of such assault or injury, the law presumes that, and expressly directs you to reason therefrom that the defendant intended to cause said death regardless of whether or not he actually had such an intent or purpose.

Add. Instr. No. 33, Appendix A-40. This was the instruction on "proof by presumption" of the kidnapping charge:

> If you find beyond a reasonable doubt that the defendant ... without lawful authority, restrained Lana Harding ... the law presumes that he acted therein with an unlawful intent, purpose or knowledge, and expressly directs you to so reason.
>
> This ... is ... a rebuttable presumption subject to being controverted and overcome by other evidence....

Add. Instr. No. 35, Appendix A-41-2. Similar instructions were given with regard to the "knowledge" and "purpose" elements of the charges of sexual intercourse without consent, and aggravated assault. Add. Instr. No. 37, 38, Appendix A-42-3.

The court went on to tell the jury, however, that the "offenses which require proof of a particular purpose ... may never be proved by means of legal presumptions, but must be proved by means of inferences only." Add. Instr. No. 32, Appendix A-39. It specified that a "particular purpose" had to be proved "in addition to proof that he committed said act either knowingly or purposely" (ibid), and that the "particular purpose cannot be proved by using the legal presumptions you have been directed to use in the proof of deliberate homicide, and must be proved by the use of inferences alone." Add. Instr. No. 34, Pet. App. 25. In each of these instructions, the court specified exactly how the jury was "permitted to infer, that is, deduce or reason from the facts and circumstances which are proved in connection therewith ... the particular purposes charged...."[15]

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[15]For example, this was the "inference" instruction on the homicide charge:

> Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, purposely assaulted Lana Harding physically and inflicted cruel suffering upon her and in so doing caused her death, you are permitted to infer, that is, deduce or reason from the facts and circumstances which are proved in connection therewith, that he did so for one or more of the particular purposes charged: either,
>
> (a) to extort something from her, or
>
> (b) to persuade her to do something against her will, or
>
> (c) to satisfy some other untoward propensity of the defendant.

Ibid. See also Add. Instr. 36, Appendix A-42.

Finally, the court gave the jury a lengthy instruction on "mental disease or defect excluding responsibility", which included the following passages.

> A person is not responsible for criminal conduct, if at the time of such conduct, as a result of a mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

Add. Instr. No. 53, Appendix A-46.

> Mental disease or defect excluding responsibility for criminal conduct is an affirmative defense, which means that the defendant must give advance notice thereof and prove this defense by a preponderance of the evidence.
>
> By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has the more convincing force and the greater probability of truth.

Id., Appendix A-47.

> To overcome this express direction of the law the defendant must prove by a preponderance of the evidence, that he suffered from such an abnormality or subnormality of the mind at the time of such conduct that the jury cannot say that it does not have a reasonable doubt as to his responsibility for such conduct.

Ibid.

> If you find beyond a reasonable doubt that the defendant did do said acts or any of them you must then consider whether or not the defendant has overcome the presumption of accountability and whether or not he has created a reasonable doubt in your minds as to his mental accountability and responsibility for any of the acts you may find he committed, and whether or not he could have had the requisite mental state for the act or acts which you have found he committed.

Ibid.

d. The Jury Deliberations and Verdicts.

The jury deliberated overnight. St.Tr. 2603. When it finally returned a verdict, it convicted Duncan McKenzie of the two most severe degrees of the crimes charged, finding him guilty of "deliberate homicide" and "aggravated kidnaping", and adding a special finding that the homicide "was" by means of torture, and the victim "was" dead as a result of the homicidal act. St. Ct. File Items 155, 156.

5. The Sentencing.

Immediately after the verdict was returned, on his own motion, Judge Nelson ordered a presentence report and set March 3, 1975, for imposition of sentence. St. Tr. 2610. On that date, he appeared with a prepared set of "Findings, Conclusions, Sentence and Order" sentencing Duncan McKenzie to death on both counts, which he read into the record. St.Tr. 2611-21.

The order was couched in terms of the 1973 Montana Death Sentencing law, which had been amended during the pretrial proceedings in Mr. McKenzie's case, in an effort to comply with Furman v. Georgia, 408 U.S. 238 (1972). That statute, like its successors, made the trial judge the sentencing authority in capital cases. Unlike its successors, it provided for sentencing discretion by requiring imposition of a death sentence upon conviction of a capital crime, "unless there are mitigating circumstances." Sections 94-5-105(1), 94-5-304, R.C.M. 1947.

Judge Nelson's "Findings" set out at length the history of the case and his purported reasons for imposing the sentence of death. Appendix E. The only portion of the Order which related to the Montana death sentencing statutes was its conclusion

> that there is nothing in the evidence of this case nor in the presentence investigation, nor in the character, nature, or background of the defendant, nor in any other matter presented to the Court which mitigate his conduct or the sentence required by law.

Appendix E-7.

6. The State Appeals.

The Montana Supreme Court upheld Petitioner's conviction and death sentence on direct appeal. State v. McKenzie, 557 P.2d 1023 (Mont. 1977). It rejected the claim that the trial court's instructions on presumptions violated the Constitution, saying simply "It was proper to give these instructions." 557 P.2d at 1043. On certiorari, this Court vacated that decision and remanded "for further consideration in light of Patterson v. New York, 432 U.S. 197 (1977)." McKenzie v. Montana, 433 U.S. 905 (1977).

On remand, the Montana Supreme Court adhered to its original decision. State v. McKenzie, 581 P.2d 1205 (Mont. 1978). On certiorari, this Court again vacated the judgment and remanded "for further consideration in light of Sandstrom v. Montana, 442 U.S. 510 (1979)". McKenzie v. Montana, 443 U.S. 903 (1979).

After that remand, the Montana Supreme Court "conceded that the jury instructions unconstitutionally shifted the burden to Petitioner to disprove that he had the criminal intent necessary to support conviction", but nonetheless reaffirmed Petitioner's conviction by holding this constitutional violation "harmless error" in light of the "overwhelming evidence" of guilt. McKenzie v. Montana, 608 P.2d 428, 458-9 (Mont.), cert. denied 449 U.S. 1050 (1980).[16]

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED HERE TO CLARIFY THE ANALYSIS OF ARGUMENTS THAT PERVASIVE CONSTITUTIONAL VIOLATIONS IN CRIMINAL JURY INSTRUCTIONS CONSTITUTE HARMLESS ERROR.

Sandstrom v. Montana, 442 U.S. 510 (1979), held that a single line in a jury instruction, which said "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated due process. Since that time, the Court has on several occasions addressed the propriety, and the prejudicial effect, of single instructions violating Sandstrom, given in the course of jury charges which were otherwise constitutionally sound. See Francis v. Franklin, 471 U.S. 307, 311 (1985); Rose v. Clark, 106 S.Ct. 3101, 3104 (1986); Burger v. Kemp, 107 S.Ct. 3114, 3119 n.5 (1987); Yates v. Aiken, 108 S.Ct. 534 (1988).

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[16]Dissenting from the denial of this third certiorari petition, Justice Marshall wrote this:

> Due to the concern that Petitioner's rights have not been preserved, this Court has already remanded this case twice. I can understand the Court's reluctance to entertain this case yet again, for we presume that the lower courts adhere to the purposes of remands from this Court. Yet the Montana Court has failed to fulfill its obligations to carry out the mandate of our decisions.

449 U.S. at 1056.

This case involves constitutional error of a different order of magnitude. In the twenty-five instructions read to the jury at the end of Duncan McKenzie's trial, the dissenting judges below counted "perhaps as many as fourteen unconstitutional presumptions." Appendix A-20 n.1. The Sandstrom violations in this case took every conceivable form.[17] The largest number of them simply tracked the same statutory language from which the instruction in Sandstrom was derived: "The law presumes ... that an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary acts." Add. Instr. No. 31; Appendix A-39; see Add. Instr. No. 33, 35, 37, 38, Appendix A-40-43. One other told the jury it could presume the elements of "knowledge or purpose" by equating the absence of insanity with a "sound mind". Add. Instr. No. 30, Appendix A-38. Two others told the jury that the statutory elements of "purpose" and "knowledge" need not be found at all, if the jury found other, distinct facts. Add. Instr. No. 33(III), 34, Appendix A-40-1. "The unconstitutional Sandstrom-type presumptions permeate the instructions given to the jury in this case." State v. McKenzie, supra, 608 P.2d at 470 (Shea, J., dissenting).

Moreover, the context in which these Sandstrom violations occurred was an extraordinarily confusing and contradictory verbal morass. As the dissenting Judges below observed:

> The instructions in this case are so bad that even the prosecution at trial objected to their use and requested that alternatives be read in their place. They are instructions that counsel for the State at the en banc oral argument admitted were in some respects the worst he had ever seen. Justice Shea of the Montana Supreme Court called the instructions "the most confusing and inconsistent set of instructions I have ever seen." McKenzie v. Osborne, 640 P.2d 368, 400 (Mont. 1981).

Appendix A-20. Notably, against the instructions' "constant drumbeat that directed the jury to presume criminal intent,"

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[17]Noting that "only a complete reading of the instructions will illustrate fully the extent" of their error (App. A-20), the four dissenting Judges below set the instructions out verbatim as an Appendix to their opinion. The instructions thus appear in full in the Appendix to this Petition, at App. A-31-49.

Appendix A-26 (dissenting opinion), there was only one flawed[18] instruction setting forth the prosecution's burden of proof beyond a reasonable doubt; and that instruction was read to the jury only once, at the beginning of this three-week long trial.

Despite the extraordinary dimension of the due process violation in these instructions, the Court of Appeals majority held them harmless. That holding raises several questions, unresolved by this Court's previous decisions addressing isolated Sandstrom errors, which warrant review here.

A.

The first question the Court of Appeals decision presents is whether the magnitude of constitutional error in jury instructions is relevant to harmless error analysis.

The Court of Appeals majority dismissed the fact that "multiple errors were committed at McKenzie's trial" as "irrelevant", holding that "the presence of multiple erroneous instructions ... has no bearing on" the harmless error analysis. Appendix A-6 n.7.

> Since even one Sandstrom instruction requires a reviewing court to assume that the jury in fact relied on the improper presumption in reaching its verdict, multiple Sandstrom instructions cannot compound the error. We reject the dissent's apparent suggestio.. that the nature of our inquiry varies with the numb er of erroneous instructions.

Ibid. The four dissenting judges in the Court of Appeals argued exactly the contrary: that harmless error analysis was "simply inappropriate" because of the multiple and pervasive flaws in the jury instructions here. Appendix A-20.

This dispute focuses on an issue which the Court in Rose v. Clark had no occasion to specifically address. Justice Powell's opinion for the Court in Rose said generally that instructional error must be "placed in context" and the ultimate harmless error "question is whether 'on the whole record ... the error ... [is] harmless beyond a reasonable doubt.'" Rose v. Clark, supra, 106

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[18]The "reasonable doubt" instruction (Prelim. Instr. No. 10, App. A-34) used language that has been condemned in federal decisions, and omitted any mention of doubts arising from a lack of evidence. See App. A-25-6 (dissenting opinion).

S.Ct. at 3107, 3109, quoting United States v. Hastings, 461 U.S. 499, 510 (1983). Justice Stevens' concurring opinion set forth a similarly flexible test, requiring a "review [of] the entire record to determine whether ... the constitutional error was harmless beyond a reasonable doubt." 106 S.Ct. at 3112. These directions certainly would seem to incorporate the longstanding principle that challenged jury instructions "must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-7 (1973).

The Court has consistently "reaffirm[ed] this formulation, which requires that the degree of prejudice resulting from instruction error be evaluated in the total context of the events at trial." United States v. Frady, 456 U.S. 152, 169 (1982); see Henderson v. Kibbe, 431 U.S. 145, 152 n.10 (1977). Thus, the lower federal courts have uniformly assumed that the context of the overall charge must be considered, "'when determining the effect of a single challenged instruction on the validity of a conviction....' See United States v. Asher, ___ F.2d ___ (3d Cir. No. 87-5096, July 20, 1988), quoting United States v. Piccolo, 835 F.2d 517, 519 (3d Cir. 1987), cert. denied 55 U.S.L.W. 3818 (1988); see also Watson v. Alabama, 841 F.2d 1074, 1076 (11th Cir. 1988); United States ex rel. Huckstead v. Green, 737 F.2d 673, 677 (7th Cir. 1984); United States v. Harrigan, 586 F.2d 860, 863 (1st Cir. 1978); United States v. Guillette, 547 F.2d 743, 750 (2d Cir. 1976).

Certainly, nothing in Rose suggested, as the Court of Appeals here held, that a consideration of the proportions of the constitutional violation has no part in harmless error analysis. The ultimate question, of course, is whether the effect of the jury instructions was to render the trial "fundamentally unfair," Pope v. Illinois, 107 S.Ct. 1918, 1922 (1987), and that necessarily turns on how a "reasonable juror" would have understood the instructing court's words. Francis v. Franklin, supra, 471 U.S. at 316. Here, the instructions must have conveyed to lay jurors a fundamental misconception of the nature

of the prosecution's burden in a criminal case.

> The effect was a constant drumbeat that directed the jury to presume criminal intent. The errors raised grave doubts about the jury's ability to perform a fair fact-finding function. Unlike cases containing a single tainted instruction, the instructions in this case do not provide the possibility to a reviewing court to excise and isolate the bad and find that the jury would have returned a verdict of guilty even if the jury had never heard the bad instructions. The whole process was infected.

Appendix A-26 (dissenting opinion) (footnote omitted).

Because of that--and because the Court of Appeals majority's conclusion that this was "irrelevant" to the harmless error analysis seems irreconcilable with principles long established by this Court for the assessment of instructional error--this issue is worthy of review. Supreme Court Rule 17.1(c).

B.

The second major question presented by the Court of Appeals majority's analysis is whether, and when, a reviewing court can find unconstitutional presumptions harmless, on the assumption that the jury did not utilize them in reaching its verdict.

"'It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., Stromberg v. California, 283 U.S. 359 [75 L.Ed.2d 1117, 51 S.Ct. 532, 73 A.L.R. 1484] (1931).'" Sandstrom v. Montana, 442 U.S. at 526, quoting Leary v. United States, 395 U.S. 6, 31-32 (1969). In Francis v. Franklin, this Court called this a "bedrock due process princip[e]." 471 U.S. at 322 n.8.

The various opinions of the Court on the harmless error question in Pope v. Illinois called this principle into question. The majority opinion in Pope held that instructional error can be found harmless although it was impossible for a reviewing court to "say beyond all reasonable doubt that the jury in fact did not have the impermissible burden-shifting instruction in mind...." 107 S.Ct. at 1922 n.6. The Court in Pope was sharply split on this issue, see 107 S.Ct. 1924-26 (dissenting opinion of Justice Stevens), and there appeared to be no clear majority resolution of it, see 107 S.Ct. at 1923 (concurring opinion of Justice

Scalia). But the Court of Appeals majority below nonetheless seized on Pope as authorizing the elaborate analysis through which it concluded "even if the jury did rely on the improper instructions, the error was harmless." Appendix A-6 n.6 (emphasis added).

The dissenting judges below succinctly summarized the majority's reasoning process:

> [T]he fact that the jury was instructed not to use a presumption in making its determination that McKenzie acted with a particular purpose indicates that the jury properly found the particular purpose element. Having found that McKenzie did act with a particular purpose, the jury necessarily rejected the defense psychiatrist's Dr. Wetzler's testimony that McKenzie was incapable of acting knowingly or purposefully. The jury, therefore, if properly instructed, would have found that McKenzie acted knowingly or purposefully.

Appendix A-29. As the dissent pointed out, several steps of this argument were "seriously flawed." Ibid. Its first premise assumes the jury applied "a law professor's precision to the use of the words 'presumed' and 'infer,'" and ignores the very real possibility that the jury applied the statutory presumptions first, "thereby impermissibly providing a building block from which to use the inference." Appendix A-25, 30.[19] Its second premise rests on a characterization of Dr. Wetzler's testimony as addressing only the question of whether Mr. McKenzie had "the capacity to form the states of mind that were elements of the offenses charged" (Appendix A-8), although Dr. Wetzler's testimony actually went beyond that, and included repeated statements that, in fact, Mr. McKenzie "didn't know what he was doing" during the crime. St.Tr. 2261.[20] The final step of the majority's syllogism turns on a play on the words "specific" and

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[19]The Court of Appeals majority found it necessary to assume that the jurors read some instructions together, but not others, to find the "particular purposes" without application of presumption instructions which appeared to apply to them. Compare App. A-6 n.5 with App. A-9 n.15.

[20]See St.Tr. 2299 ("I don't feel he appreciated he knew what he was doing."); St.Tr. 2578 ("I do not feel he was aware of what he was doing"). The defense trial motions made it clear that it considered both aspects of Dr. Wetzler's testimony significant, because the defense questioned whether the defendant "had and could have had the requisite states of mind which are elements of the various crimes charged herein." St. Ct. File Item 88.

"general" intent. Appendix A-9-10. The "particular purposes" the majority equated with "specific intent" were, in reality, much broader and more amorphous than the "purposes" to kill and kidnap the jury was unconstitutionally instructed it could presume.[21] As the dissenting judges pointed out, "[T]he 'particular purposes' are a strange assortment of goals, not all of which are clearly matters of intent,"--at least one of which, "'to satisfy some [ ] untoward propensity of the assailant' does not invite consideration of Dr. Wetzler's testimony at all." Appendix A-31, 30. "[T]he capacity to have a particular purpose does not necessary encompass the capacity to entertain a rather different kind of intent." Id. at A-31.

Though serious and fundamental, these case-specific flaws in the Court of Appeals' logic do not warrant review, as much as its very approach to the harmless error issue. The gist of the analysis that Rose appeared to authorize was whether it can be said "'beyond a reasonable doubt ... the jury would have found it unnecessary to rely on the presumption.'" Rose, 106 S.Ct. at 3109, quoting Connecticut v. Johnson, 460 U.S. 73, 97 n.5 (1983) (dissenting opinion of Justice Powell). That is consistent with the Court's longstanding refusal to attempt to divine which of several alternative lines of reasoning a jury may have adopted. Francis v. Franklin, 471 U.S. at 322 n.8. The Court of Appeals' approach to the issue here is not.

The Eleventh Circuit--which has had perhaps the most extensive experience with this question since Francis and Rose--has strictly adhered to this aspect of Rose's direction. Its cases since Rose have "recogniz[ed] harmless error in two circumstances: 'where the erroneous instruction was applied to an element of the crime that was not at issue in the trial, or (2) where the evidence as to the defendant's guilt was

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[21]The "particular purposes" on the kidnaping count involved the purpose "to inflict bodily injury," "to terrorize" or "to facilitat[e] ... sexual intercourse" or "to commit an aggravated assault". On the homicide count, the "particular purposes" included a "purpose" "to extort," "to persuade," or "to satisfy some other untoward propensity." Add. Instr. No. 29, App. A-37.

overwhelming." Corn v. Kemp, 837 F.2d 1474, 1475-6 (11th Cir. 1988), quoting Bowen v. Kemp, 832 F.2d 546, 548 (11th Cir. 1987) (en banc). See also Godfrey v. Kemp, 836 F.2d 1557, 1561 (11th Cir. 1988); Dick v. Kemp, 833 F.2d 1448 (11th Cir. 1987). It has not gone farther to find Sandstrom error harmless by hypothesizing a jury analysis that circumvented the unconstitutional presumptions[22] as the Court of Appeals majority did here. Thus, in this series of cases--involving homicides no less gruesome than this one, conflicting psychiatric evidence which the jury must have resolved largely in favor of the prosecution, and Sandstrom errors far less egregious than those here--the Eleventh Circuit has uniformly declined to find harmless error. See id. at 837 F.2d 1476-77, and cases there cited.

The Court of Appeals here reached the opposite conclusion, not so much because of the facts of this case, but because of an approach to the issue fundamentally different than other Circuits have taken, or Rose seemed to authorize. This additionally warrants this Court's review. Supreme Court Rule 17.1(a).

C.

A third question that arises from the Court of Appeals' decision is whether instructions which wholly withdraw from the jury mens rea elements defined by state law can ever be found to be harmless error.

"The error in Rose did not entirely preclude the jury from considering the element of malice...." Pope v. Illinois, 107 S.Ct. 1922, citing Rose v. Clark, 106 S.Ct. 3107 n.8. In contrast, two of the Sandstrom-violative presumption instructions in this case could well have been understood by "a reasonable

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[22]See Corn v. Kemp, 837 F.2d at 1476:

> "when a criminal defendant raises an insanity defense, a Sandstrom error ordinarily cannot be held harmless on the grounds that intent is not at issue." [Bowen v. Kemp, supra] 832 F.2d at 547. The only exception to that rule is in the rare case where a defendant removes the issue from the jury by admitting an intent to commit the act charged. 832 F.2d at 550 n.13.

(Emphasis added.)

juror" Sandstrom v. Montana, 442 U.S. at 519, to conclusively take the statutory mens rea issues from them.

One of these was Additional Instruction Number 30. That instruction first told the jury that unless the defendant suffered from a "disease or defect of the mind which excludes responsibility", he was necessarily "of sound mind," so that his "knowledge or purpose ... is manifested by the circumstances...."--and then said flatly "the defendant is presumed to be" free from such mental defect.[23] Nowhere was the jury told that this was the kind of "presumption" that could be rebutted, as several other instructions clearly said their "presumptions" could be. The second conclusive presumption was was created by two instructions which did not use the word "presumption" at all. They were Preliminary Instruction No. 23, and Additional Instruction No. 34, both of which told the jury that, if it found any of the broadly defined elements of "torture," it could convict Mr. McKenzie of "deliberate homicide" "whether or not it was his purpose or intention to kill." See Appendix A-36, 41. These instructions thus withdrew from the jury the specific elements of "knowledge" and "purpose", which were part of the definition of deliberate homicide under Montana law. See Section 94-5-102, R.C.M. 1947, Appendix D-1; State v. McKenzie, 608 P.2d at 476 (Shea, J., dissenting).

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[23]The full instruction read as follows:

> The knowledge or purpose with which an act is done is manifested by the circumstances connected with the offense and the sound mind of the accused. All persons are of sound mind who are not afflicted with a disease or defect of the mind which excludes responsibility for their conduct.
>
> Upon the trial of the issues raised by the plea of not guilty to the charge made by the information, the defendant is presumed to have been free from any disease or defect of the mind which excludes responsibility for his conduct at the time the offenses are alleged to have been committed and to be sane now.

Add. Instr. No. 30.

The Court of Appeals majority did not distinguish these instructions from the other Sandstrom violations; it said "[w]e find no irrebutable presumptions"[24], but opined that the rebuttable nature of a presumption "does not make it any less erroneous." Appendix A-6 n.5. The dissent noted, but had no occasion to rely on, the principle that "a directed verdict on an element of the offense in favor of the State can never be harmless. See Connecticut v. Johnson, 460 U.S. 73, 84 (1983) (plurality opinion); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-3 (1977)." Appendix A-21.

There is a substantial division among the Circuits whether this principle remains viable, after Rose v. Clark. The Sixth Circuit has taken a clear position "that a trial court's failure to instruct the jury on an essential element of the offense charged preclude[s] application of harmless error principles." United States v. Mintz, 840 F.2d 315, 324 n.17 (6th Cir. 1988); see Hoover v. Garfield Heights Municipal Court, 802 F.2d 168, 177 (6th Cir. 1986), cert. denied 107 S.Ct. 1610 (1987). The Seventh Circuit has taken the contrary position. United States v. Curly, 838 F.2d 932, 939 (7th Cir. 1988). "The picture in the other circuits is mixed." Ibid. The Eighth Circuit has held such an "error cannot be treated as harmless." United States v. Voss, 787 F.2d 393, 398 (8th Cir. 1986). See also United States v. Whitehorse, 807 F.2d 1426, 1432 (8th Cir. 1986); but see Whiting v. Benson, 739 F.2d 1360, 1364 (8th Cir. 1984). The First Circuit has agreed, at least in dictum. United States v. Argentine, 814 F.2d 783, 789 (1st Cir. 1987). The Second Circuit has applied harmless error principles to instructions eliminating statutory elements, Rosenfeld v. Dunham, 820 F.2d 52, 54 (2nd Cir. 1987), as has the Fifth Circuit, in dictum. United States v. Bass, 784 F.2d 1282, 1285 (5th Cir. 1986).

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[24]The Court of Appeals majority assumed the jury would have found the word "presumed" in Add. Instr. No. 30 modified by a later instruction which said--specifically referring to "presumptions" of intent arising from conduct--"[u]nless you are otherwise instructed ... all presumptions are rebuttable." Add. Instr. No. 31(II), App. A-39. See App. A-6 n.5. It did not address Add. Instr. No. 34.

The Court of Appeals' equation of the conclusive and the rebuttable presumptions in this case, for purposes of harmless error analysis, thus presents an additional issue on which there is substantial disagreement among the lower courts. The need to resolve that conflict among the Circuits is a further reason certiorari should be granted here. Supreme Court Rule 17.1(a).

II. CERTIORARI SHOULD BE GRANTED HERE TO DETERMINE WHETHER A DEATH SENTENCE IMPOSED AFTER TRIAL, BY A TRIAL JUDGE WHO AGREED BEFORE TRIAL TO IMPOSE A SENTENCE OF IMPRISONMENT UPON A PLEA OF GUILTY, VIOLATES THE EIGHTH AMENDMENT.

United States v. Jackson, 390 U.S. 570 (1968) invalidated a portion of a federal statutory scheme which provided for imposition of a sentence of death only upon recommendation of a jury after trial. The Court held that, because the act "impose[d] an impermissible burden upon the exercise of a constitutional right," "its capital punishment clause violates the Constitution." 390 U.S. at 572. In Corbitt v. New Jersey, 439 U.S. 212 (1978), the Court distinguished Jackson, largely by the fact that "the death penalty, which is 'unique in its severity and irrevocability,' Gregg v. Georgia, 428 U.S. 153, 187 ... [was] not involved ..." 439 U.S. at 217. Jackson thus stands both for the narrow proposition that a death sentence may not be justified by a defendant's failure to plead guilty, see Zant v. Stephens, 463 U.S. 862, 885 (1983), and for the broader Eighth Amendment principle that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination. California v. Ramos, 463 U.S. 992, 998-999, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)." Turner v. Murray, 106 S.Ct. 1683, 1688 (1986).

It was and is undisputed that the trial judge who sentenced Duncan McKenzie to death after his trial, agreed before trial to impose a sentence of imprisonment for precisely the same crime. The Court of Appeals upheld this by distinguishing Jackson, on the ground that Mr. McKenzie was willing to plead guilty, so that "none of ... [his] constitutional rights were burdened when the State refused to go through with the proposed plea agreement."

Appendix A-12. It thus allowed exactly what Jackson forbade: imposition of a death sentence after trial, on a defendant who would have received a sentence of imprisonment on a guilty plea.

The Court of Appeals' limitation of Jackson to circumstances where defendants are actually discouraged by the threat of death from exercising their trial rights, is hard to square with Jackson and its progeny. Indeed, Jackson applied directly only to those defendants who were not deterred by the threat of death, and actually exercised their right to trial. See Lockett v. Ohio, 438 U.S. 586, 617-618 (1978) (concurring opinion of Justice Blackmun); Atkinson v. North Carolina, 403 U.S. 948 (1971); Pope v. United States, 392 U.S. 651 (1968). Brady v. United States, 397 U.S. 742 (1970) held that defendants who were induced by the statutory scheme to enter pleas of guilty, could not challenge their guilty pleas under Jackson. The Court of Appeals' view, that Jackson's application turns on the subjective response of an individual defendant, seems irreconcilable with these decisions.

More important, the decision of the Court of Appeals on this issue wholly ignores Jackson's Eighth Amendment aspect. If the Eighth Amendment requires that a "decision to impose a death sentence be, and appear to be, based on reason," Gardner v. Florida, 430 U.S. 349, 358 (1977), it is hard to see how the difference between life and death can be allowed to depend on the fortuities of the plea bargaining process, rather than any aspect of a capital defendant's individual culpability. See Hitchcock v. Wainwright, 745 F.2d 1332, 1346-7 (11th Cir. 1984) (Johnson, J., dissenting), rehearing en banc granted, 745 F.2d 1348, reversed on other grounds, 107 S.Ct. 1821 (1987).

Although this Court has held that judges may act as sentencing authorities in capital cases, Spaziano v. Florida, 468 U.S. 447 (1984), it has simultaneously "insisted that the sentencing decision be based on the facts and circumstances of the individual and his crime." 468 U.S. 460 n.7. "[T]here must be a valid penalogical reason for choosing from among the many criminal defendants the few who are sentenced to death." Ibid.

Although prosecutorial discretion necessarily plays a part in capital prosecutions, the Court has assumed that, too, will be guided by rational and relevant concerns. See Gregg v. Georgia, 428 U.S. 153, 225 (1976) (concurring opinion of Justice White).

Here, that expectation was not met. The trial judge allowed his decision to be controlled by the prosecutors, and the prosecutors in turn let their decision be controlled by the victim's family's desire that the case go to trial.[25] Wholly apart from the fact that the upshot of this was to penalize Duncan McKenzie's failure--indeed, his inability--to plead guilty, this sequence of abdications created an unacceptable "risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim ... or mistake.' Caldwell [v. Mississippi,] 105 S.Ct. at 2647 (O'Connor, J., concurring in part and concurring in the judgment)." Turner v. Murray, 106 S.Ct. at 1638.

Certiorari should be granted here to determine if the Court of Appeals' opinion allowing that can be squared with United States v. Jackson. Supreme Court Rule 17.1(c).

III. CERTIORARI SHOULD BE GRANTED TO DETERMINE IF A SENTENCING JUDGE WHO HOLDS THERE ARE "NO CIRCUMSTANCES WHICH MITIGATE," DESPITE THE DEFENDANT'S ACKNOWLEDGED PSYCHOLOGICAL DISORDERS AND CHILDHOOD DEPRIVATION, "CONSIDERS" MITIGATING EVIDENCE IN THE MANNER REQUIRED BY THE EIGHTH AMENDMENT.

Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) was the culmination of a line of cases in which this Court has held that the Eighth Amendment requires state courts to "consider all relevant evidence and weigh it against the evidence of aggravating circumstances." Eddings v. Oklahoma, 455 U.S. 104, 117 (1982). Eddings held that "[n]ot only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant

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[25]The Court of Appeals majority was particularly undisturbed by the fact that the difference between life and death for Duncan McKenzie was the influence of Lana Harding's family on the state prosecutors' plea bargaining decision. See App. A-13, n.25. But it cannot be a valid justification for Duncan McKenzie's death that Ms. Harding's family was politicaly prominent, and wished the case to go to trial. "Certainly the degree to which a family is willing and able to express its grief is irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die." Booth v. Maryland, 55 U.S.L.W. 4836, 4838 (U.S., June 16, 1987).

mitigating evidence, but 'Lockett requires the sentencer to listen' to that evidence." Sumner v. Shuman, 107 S.Ct. 2716, 2722 (1987). Hitchcock applied that principle to judicial sentencing orders which appeared to exclude from the weighing process nonstatutory mitigating factors.

The trial court's decision sentencing Duncan McKenzie to death was premised on a determination that there were "no circumstances which mitigate the defendant's conduct or the sentence to be imposed." Sentencing Order, Appendix E-9 (emphasis added).

> There is nothing in the evidence of the case, nor in the presentence investigation, nor in the character, nature, or background of the defendant, nor in any other manner presented to the court which mitigate his conduct or the sentence required by law.

Id. at 7 (emphasis added). In the absence of such wholesale rejection, a life sentence was required: Montana law provided the death sentence could not be imposed if there were any "mitigating circumstances." See R.C.M. 1947 §§94-5-105, 94-5-304 (1974 Supp.), Appendix D-1. But the Sentencing Order focused not on mitigation, but on nonstatutory aggravating factors, such as the defendant's prior record and likely future dangerousness if released. Appendix E-7-9.

The only part of the Sentencing Order approaching a discussion of the concept of mitigation--aside from the conclusory recitations set out above--were two paragraphs concerning the psychiatric issues at trial. The first of these paragraphs seriously misstated the psychiatric evidence: it said, "[t]he defendant's psychiatrist testified that the defendant knew right from wrong" (Appendix E-7), although in fact Dr. Wetzler actually testified exactly to the contrary: "He [McKenzie] did not know the difference between right and wrong at the time of the alleged act." St. T. 2575. The second paragraph appeared to treat the jury's verdict on the issue of sanity as dispositive of all psychological issues in the case. Appendix E-8.

The record contained a substantial body of mitigating evidence apparently ignored in the sentencing determination. Dr. Wetzler, the defense psychiatrist, classified Mr. McKenzie as a "schizoid

personality." St. T. 2573. The State's two psychological experts both found Mr. McKenzie suffering from classifiable personality disorders. St. T. 2526, 2545. Both experts tied these problems to Mr. McKenzie's deprived background. Dr. Wetzler spoke of his "[l]ifelong unfortunate disturbance, heredity, environmental factors that produce this type of unfortunate person we have." St. T. 2262. The State's psychiatrist, Dr. Gracia, spoke of Mr. McKenzie's "very difficult family background" and his childhood "psychologic trauma" that left him "handicapped when he had to face life as a separate entity, as an individual." St. T. 2405.

The trial court's apparent rejection of the psychological testimony because of the jury's finding of sanity reflects a profound misunderstanding of the nature of mitigating evidence. See Eddings v. Oklahoma, 455 U.S. 104, 113 (1982). The Montana law under which this case was tried did not define "mitigating circumstances" in any way. But the current Montana law does; and that law, like most other death sentencing statutes now in effect, recognizes as a mitigating fact that an offense "was committed while the defendant was under the influence of extreme mental or emotional disturbance," or that "[t]he capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired." M.C.A. §46-18-304 (1979).[26]

Similarly, the principle of Lockett v. Ohio, 438 U.S. 536 (1978) "requires the trial court to consider and weigh all the mitigating evidence concerning the petitioner's family background and personal history." Eddings v. Oklahoma, 455 U.S. at 119 (concurring opinion of Justice O'Connor). "Defendants who commit

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[26] See, e.g., Florida Stat. Ann. §921.141(6)(B) and (F) (Supp. 1976-1977), quoted in Proffitt v. Florida, 428 U.S. 242, 248 (1976). See also, e.g., Ariz. Rev. Stat. Ann. §13-702(E)(2); Cal. Penal Code §190.3(d); Colo. Rev. Stat. §16-11-103(5.1)(a); Ill. Ann. Stat. §38 9-1(e)(2); Ind. Code Ann. §35-50-2-9(c)(2); Ky. Rev. Stat. §532.025(2)(b)(2); La. Code Crim. Pros. Ann. art. 905.5(b); Md. Ann. Code art. 27 §413(g)(4); Miss. Code Ann. §99-19-101(6)(b); Mo. Rev. Stat. §565.012(3)(2); Neb. Rev. Stat. §29-2523(2)(b),(c); Nev. Rev. Stat. §200.032(2); N.M. Stat. Ann. §31-20A-6(d); 42 Pa. Cons. Stat. Ann. §9711(e)(2); S.C. Code Ann. §16-3-20(C)(b)(2); Tenn. Code Ann. §39-2-203(g)(2); Utah Code Ann. §76-3-207(1)(b); Va. Code §19.2-264.4(B)(ii); Wash. Rev. Code Ann. §10.95.070(2); Wyo. Stat. §6-4-102(i)(ii).

criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 107 S.Ct. 837, 841 (1987) (concurring opinion of Justice O'Connor). The trial court's Sentencing Order indicates it failed to recognize that these facts were to be weighed in the sentencing decision.

The en banc panel of the Court of Appeals did not address this issue, but instead adopted (without explicit reference) the decision of the original panel on this point.[27] That decision, rendered before Hitchcock, found it conclusive that the state trial court had said he found "no circumstances which mitigate the defendant's conduct or the penalty to be imposed." McKenzie v. Risley, 801 F.2d 1519, 1531 and n.7 (9th Cir. 1986), Appendix A-62. That lack of critical examination of a state sentencing court's compliance with Lockett seems irreconcilable with Hitchcock--and with the decisions of other lower courts, which have carefully scrutinized not only the announcements of state sentencing judges on the existence of mitigating factors, see, e.g., Messer v. Florida, 834 F.2d 890 (11th Cir. 1987), but also the sufficiency of the evidence to support these findings, see Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986); cf. Enmund v. Florida, 458 U.S. 782, 827 (1982) (concurring opinion).

Certiorari should be granted here to determine whether the Court of Appeals' failure to scrutinize the sentencing court's bald conclusion denying the existence of any mitigation in this case, can stand in light of Hitchcock. Supreme Court Rule 17.1(c).

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[27] Petitioner sought rehearing of the en banc decision, to clarify its disposition of this issue; that motion was denied without elaboration. Appendix C.

CONCLUSION

Certiorari should be granted and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

Timothy K. Ford
Attorney for Petitioner

Dated: August 8, 1988

APPENDIX A

Duncan Peder McKENZIE, Jr.,
Petitioner-Appellant,

v.

Henry RISLEY, et al.,
Respondents-Appellees.

No. 85-4156.

United States Court of Appeals,
Ninth Circuit.

Argued En Banc and Submitted
Aug. 12, 1987.

Decided March 10, 1988.

Montana state prisoner petitioned for habeas corpus relief. The United States District Court for the District of Montana, James F. Battin, Chief Judge, dismissed petition, and prisoner appealed. The Court of Appeals, J. Blaine Anderson, Circuit Judge, 801 F.2d 1519, affirmed. Rehearing en banc was granted. The Court of Appeals, Kozinski, Circuit Judge, held that: (1) *Sandstrom* error was harmless; (2) prisoner's constitutional rights were not burdened when state refused to go through with proposed plea agreements; and (3) Montana's death penalty statutes are constitutional.

District court's dismissal of petition affirmed.

Fletcher, Pregerson, Canby, and Norris, Circuit Judges, filed a dissenting opinion.

1. **Criminal Law** ⇐1172.2
In considering whether *Sandstrom* errors are harmless, nature of trial court's inquiry does not vary with the number of erroneous instructions.

2. **Criminal Law** ⇐1163(1)
Once an error of constitutional magnitude is shown, state has burden of establishing beyond a reasonable doubt that the error was harmless.

3. **Habeas Corpus** ⇐113(12)
Court of Appeals reviews district court rulings on petitions for habeas corpus de novo.

4. **Habeas Corpus** ⇐45.2(7), 85.1(2)
Ultimate determination of whether *Sandstrom* error was harmless is subject to de novo review as a question of federal constitutional law in habeas proceeding; however, factual findings underlying state court's determination of harmless error are entitled to presumption of correctness. 28 U.S.C.A. § 2254(d).

5. **Habeas Corpus** ⇐90.3(5)
In habeas proceeding, federal courts must defer to state court factual findings in the absence of convincing evidence to the contrary and may set them aside only if they lack fair support in record.

6. **Habeas Corpus** ⇐85.1(2)
Presumption of correctness in habeas cases applies to state appellate court findings of intent.

7. **Criminal Law** ⇐1172.2
The fact that defendant contested intent to commit crime does not automatically render *Sandstrom* error prejudicial.

8. **Criminal Law** ⇐1172.2
Trial court's function in applying harmless error analysis to *Sandstrom* error is to determine whether jury could have developed reasonable doubt as to defendant's intent had it never heard impermissible instructions.

9. **Criminal Law** ⇐1144.15
Appellate court must presume that jury followed its instructions in reaching verdict in criminal case.

10. **Criminal Law** ⇐46
A finding of capacity to form specific intent necessarily encompasses finding of capacity to form general intent, since former requires higher degree of mental awareness and cognitive ability.

11. **Criminal Law** ⇐1172.2
Erroneous *Sandstrom* instruction, which shifted burden of proof on intent from prosecution to defense in state murder prosecution, was harmless; jury necessarily rejected psychiatrist's testimony that defendant lacked capacity to form states of mind that were elements of offenses charged, and sophisticated and complex nature of kidnapping and murder, multiple and varied forms of criminal acts committed, and duration of activity foreclosed any explanation other than that defendant intended to commit crimes.

12. **Criminal Law** ⇐273(3)
Defendants have no constitutional right to plead guilty to lesser crimes than those charged.

13. **Criminal Law** ⇐273.1(2)
Jury ⇐31(11)
Defendant's constitutional right not to plead guilty and Sixth Amendment right to

jury trial were not burdened when state refused to go through with proposed plea agreement. U.S.C.A. Const.Amends. 5, 6.

14. **Criminal Law** ⇐**986.2(5)**

Fact that sentence imposed after trial is more severe than one trial judge was willing to impose as part of plea bargain does not impeach legitimacy of sentence.

15. **Criminal Law** ⇐**1208.1(4)**

It was not improper for prosecutors to consider wishes of victim's family in deciding to seek death penalty at trial rather than accept plea bargain.

16. **Criminal Law** ⇐**1134(3), 1208.1(6)**

Procedures for imposing death sentence must conform to certain guidelines; discretion of sentencer must be suitably directed and limited so as to minimize risk of wholly arbitrary and capricious action and there must be review of sentence by court of statewide jurisdiction to insure that sentence has not been imposed in arbitrary manner and is not disproportionate to underlying crime.

17. **Criminal Law** ⇐**1134(3)**

Constitution does not require that state court review of death sentences include comparison of sentences imposed in similar cases.

18. **Homicide** ⇐**351**

Aggravating circumstances found in Montana's death penalty statutes, requiring finding that victim's death was caused by torture, and requiring finding that a kidnapped victim died as a result of the kidnapping, rather than just kidnapping, sufficiently added to underlying crime while at same time narrowing class of people eligible for death penalty to make aggravating circumstances constitutional basis for application of death penalty. R.C.M. 1947, §§ 94-5-105, 94-5-304 (Repealed).

19. **Criminal Law** ⇐**1208.1(3)**

Reliance on nonstatutory aggravating circumstances in death penalty case is permissible so long as statutory sentencing scheme requires that at least one statutory aggravating circumstance be found before death sentence may be imposed.

20. **Criminal Law** ⇐**1206.1(2)**

Fact than Montana death penalty statutes did not themselves explicitly set out process by which mitigating circumstances were to be considered did not render statutes deficient; Montana Supreme Court construed state law to require presentation and consideration of all mitigating factors, including all such evidence contained in presentencing report. R.C.M. 1947, §§ 94-5-105, 94-5-304 (Repealed).

21. **Criminal Law** ⇐**1206.1(2)**

Montana's sentencing scheme provided adequate opportunity for appellate review of death sentences; death penalty sentencing scheme required finding of aggravating circumstances before death penalty could be considered for particular crime, required consideration of mitigating circumstances before it would be imposed, provided procedures by which evidence relating to issues could be presented to sentencing authority, and mandated two forms of review by courts of statewide jurisdiction. R.C.M. 1947, §§ 95-2401, 95-2404, 95-2405(a), 95-2406(a), 95-2408, 95-2426.

Timothy K. Ford, Seattle, Wash., for petitioner-appellant.

Chris D. Tweeten, Asst. Atty. Gen., Helena, Mont., for respondents-appellees.

Appeal from the United States District Court for the District of Montana.

Before WALLACE, FLETCHER, FARRIS, PREGERSON, ALARCON, CANBY, NOFRIS, WIGGINS, BRUNETTI, KOZINSKI and O'SCANNLAIN, Circuit Judges.

OPINION

KOZINSKI, Circuit Judge:

Appellant Duncan Peder McKenzie, Jr., convicted of murder and sentenced to death by the State of Montana, appeals from the district court's dismissal of his petition for writ of habeas corpus. A panel of this court affirmed the dismissal in *McKenzie v. Risley*, 801 F.2d 1519 (9th Cir.1986), but McKenzie's suggestion for rehearing en banc was subsequently granted. 815 F.2d 1323 (9th Cir.1987). We now affirm.

I. BACKGROUND

The Montana Supreme Court described the facts as follows:

The victim in this case was Lana Harding, a 23 year old rural school teacher in Pondera County, Montana. On Tuesday morning, January 22, 1974, she failed to appear at school. At the Pioneer School teacherage where she lived the bed was found in a disheveled condition. The sheriff of Pondera County was called and officers were dispatched to the school arriving there midmorning.

Investigation that day revealed (1) a red tennis shoe belonging to Lana Harding just outside the school, (2) a drag trail from the teacherage to a nearby road, (3) blood near the end of the drag trail (later identified as Lana's type and RH factor) and (4) a wrist watch belonging to Lana in the same area as the blood. Lana Harding was last seen in Conrad, Montana, 13 miles from the teacherage on Monday, January 21, at about 5:00 p.m.

Defendant had recently moved into the community and was working for the K & K Wholesale Seed Company, located approximately three miles from the Pioneer School teacherage. A day or so before January 21 he made arrangements to buy a 1948 black Dodge pickup, recognizable to most inhabitants of the area because it had belonged to one local owner for a long period of time. On January 21 defendant had worked on the pickup after work. He was seen leaving K & K Wholesale Seed Company at approximately 6:45 p.m. in his black pickup headed toward his place of residence not far from the teacherage. The pickup was seen about 7:00 p.m. about a mile from the teacherage.

Approximately an hour later, around 8:00 p.m., defendant knocked on the door of the Pearson farm residence located across the road from the teacherage. He asked for assistance in starting his pickup. It was later determined his pickup was parked in the road at a point where the drag trail ended and where the blood and watch were found the following day. At the Pearson residence defendant asked directions to his own residence and called his wife to say he was coming home. Don Pearson pulled the pickup, got it started and noted defendant did not drive on towards his place of residence. Shortly thereafter, the pickup was seen being driven toward the drill where Lana's body was found the following day.

Her body was found clothed only in a shirt[,] sweater and bra. It was draped over the tongue of a grain drill. She had been severely beaten about the head and body. The forensic pathologist who examined the body testified the death blow had been delivered to the head and laid open the right side. A rope was tied around her neck; there was evidence she had been strangled; however pressure had been released so she did not die of strangulation. A coil of wire was entangled in her hair, later shown to have come from a roll of wire found in the back of defendant's pickup.

During the search for the body and the investigation of the homicide three additional items were found: (1) A pair of gloves worn by defendant at work were found in a field not far from where the body was discovered with human blood on them, (2) overshoes with Lana's type blood and brain tissue on them were found about a quarter of a mile away, and impressions from the soles matched the heels of boots later taken from defendant's home; and (3) Lana's purse was found near the place where the overshoes were covered.

As a result of the investigation by the sheriff and his deputies, the county attorney, on Tuesday afternoon, January 22, filed a complaint charging defendant with assault before the justice of the peace. The county attorney also obtained a warrant for the arrest of defendant and a search warrant.

Defendant was thereafter arrested at his home. The black Dodge pickup was seized and impounded and blood was found in the bed of the pickup and on the springs; the back end of the pickup had been recently sprayed with black paint; the spray paint was later identified by FBI experts as identical to paint brand-named "Weekend" which was not available in the Conrad-Pondera County, Montana area. A can of the black spray paint was found in the cab of the pickup and another was later found at defendant's home.

The following items were found in the back of the pickup: (1) a coil of wire later identified as having been the source of wire found in the victim's hair, (2) an exhaust manifold that had been painted black, and (3) human blood of the same kind and RH factor as Lana's and brain and corticle tissue were found on the manifold. Dr. John Pfaff, who examined the victim's body and the manifold, testified that the manifold could have inflicted the fatal blow.

At the drill site where the body was located, a piece of brass from a water pump was found. The prior owner of the Dodge pickup testified this piece of brass was in [the] back of the pickup when defendant took possession of the pickup on January 19.

Several co-workers at the K & K Wholesale Seed Co. testified at trial that defendant had said on January 21 that he

broke in every new vehicle by engaging in sexual intercourse in [it]. Several days before defendant had remarked that he had had intercourse with country school teachers; and that they were naive, he could teach them, and they were easy to get.

Subsequently defendant was charged with several crimes to which he entered pleas of not guilty. Following trial, he was convicted by a jury of the crimes of deliberate homicide by means of torture and aggravated kidnapping. Judgment was entered thereon and a death sentence imposed. Defendant appealed.

State v. McKenzie, 186 Mont. 481, 608 P.2d 428, 434–36 (1980) (*McKenzie III*).

The panel opinion summarized the extensive procedural history of the case:

> The Montana Supreme Court affirmed the convictions and the sentence. *State v. McKenzie (I)*, 557 P.2d 1023, 171 Mont. 278 (1976). The Montana Supreme Court rejected McKenzie's claim, *inter alia*, that the trial court's jury instructions on presumptions and the Montana death penalty statute violated the Constitution. The United States Supreme Court granted certiorari, vacated the judgment, and remanded for further consideration in light of *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). *McKenzie v. Montana*, 433 U.S. 905, 97 S.Ct. 2968, 53 L.Ed.2d 1089 (1977).
>
> On remand, the Montana Supreme Court, after reexamining all of the issues raised by McKenzie, adhered to its original decision. *State v. McKenzie (II)*, 581 P.2d 1205, 177 Mont. 280 (1978). The Montana Court held that the jury instructions did not erroneously shift the burden of proof on the issue of intent, but even if they did, such an error would not have affected the jury's verdict because the evidence of intent was overwhelming. 581 P.2d at 1223–24.
>
> Following the Montana Supreme Court's affirmance of the convictions and the sentence in *McKenzie II*, McKenzie sought relief through the Sentence Review Division of the Montana [Supreme] Court. His petition for review was denied. His attempted appeal of that decision to the Montana Supreme Court was also denied because there was no appeal from a decision of the Sentence Review Division.
>
> McKenzie again petitioned for certiorari to the United States Supreme Court. Certiorari was granted, the judgment was vacated, and the case was remanded for further consideration in light of *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). *McKenzie v. Montana*, 443 U.S. 903, 99 S.Ct. 3094, 61 L.Ed.2d 871 (1979). The Montana Supreme Court once again affirmed the convictions and the sentence. *State v. McKenzie (III)*, 608 P.2d 428, 186 Mont. 481 (1980). This time, however, the Montana Court conceded that some of the jury instructions unconstitutionally shifted the burden of proof to McKenzie to disprove that he had the criminal intent necessary to support his conviction. 608 P.2d at 457–58. His conviction was nevertheless reaffirmed because the court found the unconstitutional jury instructions harmless beyond a reasonable doubt in light of the overwhelming evidence of intent. 608 P.2d at 459.
>
> McKenzie once again sought certiorari from the United States Supreme Court. This time certiorari was denied. *McKenzie v. Montana*, 449 U.S. 1050, 101 S.Ct. 626, 66 L.Ed.2d 507 (1980) (Justices Marshall and Brennan dissenting). McKenzie then filed a petition for post-conviction relief or habeas corpus in the Montana state district court. The petition was denied. The denial was affirmed by the Montana Supreme Court. *McKenzie v. Osborne (McKenzie IV)*, 640 P.2d 368, 195 Mont. 26 (1981).
>
> McKenzie then filed a petition for a writ of habeas corpus in federal district court. The district court dismissed the petition and it is from that dismissal that McKenzie timely appeals to this court. 801 F.2d at 1522–23.

The panel rejected all of McKenzie's arguments and affirmed. McKenzie petitioned for rehearing of three questions resolved by the panel: (1) whether the *Sandstrom* errors in the jury instructions were harmless; (2) whether the trial judge's decision to sentence McKenzie to death after he had approved a plea agreement calling for a prison sentence violated *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); and (3) whether the statutory scheme under which

McKenzie was sentenced was constitutional. Except as otherwise indicated below, we address only the issues raised by McKenzie on rehearing.

II. DISCUSSION

A. *Sandstrom Error*

1. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." The Court has since interpreted *Winship* to preclude a state from shifting to the defendant the burden of proof on any element of the crime charged. *Patterson v. New York*, 432 U.S. 197, 215–16, 97 S.Ct. 2319, 2329–30, 53 L.Ed.2d 281 (1977); *Mullaney v. Wilbur*, 421 U.S. 684, 697–701, 95 S.Ct. 1881, 1888–1891, 44 L.Ed.2d 508 (1975). In *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the Supreme Court applied *Mullaney* and *Winship* to hold unconstitutional a Montana jury instruction which stated that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513, 99 S.Ct. at 2453. The Court held that this instruction may have been interpreted by the jury as shifting the burden of proof on intent—an element of the crime[1]—to the defendant, undermining his constitutional right to be presumed innocent. *Id.* at 524, 99 S.Ct. at 2459.

The parties agree that some of the jury instructions given in this case violated *Sandstrom*.[2] Specifically, the jury was instructed that:

> [T]he law presumes, that is, the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act.
>
> ....
>
> Further, unless you are otherwise instructed with regard to a particular presumption, all presumptions are rebuttable; that is, they may be controverted and overcome by other evidence.

Add'l Instr. No. 31, App. at C-21 [at 1563].[3] Similar instructions were given on the elements of various offenses.[4] While these

1. Sandstrom was charged with committing deliberate homicide in violation of Revised Code of Montana (R.C.M.) § 94-5-102(1)(a), which required a finding that he "purposely or knowingly" killed his victim.

2. The dissent goes further, claiming that the instructions were internally inconsistent, ambiguous and incoherent. *Post* at 1543–44, 1548–49, 1549–50, 1554. While *Sandstrom* rendered the instructions partially invalid, they accurately reflected the state of the law when given. Moreover, they were not confusing, contradictory or incoherent. Except for the *Sandstrom* errors, the instructions were entirely adequate and provided the jurors with an appropriate and understandable framework to guide their deliberations. Indeed, the instructions on the two crimes for which McKenzie was ultimately convicted—deliberate homicide by means of torture and aggravated kidnapping—were free from *Sandstrom* error, clearly and unambiguously permitting the jury to find intent through inferences while forbidding it to rely on presumptions. *See* Add'l Instrs. 34, 36, Appendix to Dissent (App.) at 1565, 1566.

   The dissent makes much of the condemnatory language used by the two dissenting justices in *McKenzie IV*. *Post* at 1549–50. But these justices' disagreements with the majority were based largely on issues not before us, including questions of state law as to which we must accept the five-member majority's determination. Since these critical statements were not made solely—even primarily in reference to the *Sandstrom* errors, we question their relevance to the case before us.

3. The trial judge gave a number of general jury instructions before any evidence was presented, and gave further instructions orally after the close of the defendant's case. These will be cited respectively as "Instrs." and "Add'l Instrs." Written copies of both sets of instructions were given to the jury for use during its deliberations. State Trial Transcript (R.T.) at 2601.

4. With respect to deliberate homicide, the jury was told:

   > If you find beyond a reasonable doubt that the defendant ... voluntarily committed an illegal act on Lana Harding, such as assaulting or injuring her, the law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose.
   >
   > This is a rebuttable presumption, which means it may be controverted and overcome by other evidence....

instructions did not require the jury to conclusively presume intent, they did permit a rational juror to believe that intent could be found without proof by the prosecution, thereby shifting the burden of proof on this issue to the defense.[5]

The state does not deny that the instructions contained multiple *Sandstrom* errors. It argues instead—and every court considering the issue has found—that, because of the unique circumstances of McKenzie's trial, the errors were harmless beyond a reasonable doubt.

[1] Until recently, the question of whether *Sandstrom* errors could be harmless had not been authoritatively resolved. In *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3108-09, 92 L.Ed.2d 460 (1986), however, the Supreme Court held that the harmless error standard of *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), applied to such errors. In *Pope v. Illinois*, — U.S. —, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), the Court further explicated the proper role of an appellate court in applying *Clark*'s harmless error analysis. In *Pope* the Court articulated the test as follows: whether "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same."[6] 107 S.Ct. at 1922 n. 6. Significantly, the Court held that even if the jury did in fact have "the impermissible presumption in mind when it considered the [relevant] element" of the crime, the error would be harmless "if the facts that the jury necessarily found established guilt beyond a reasonable doubt." *Id.* at 1922.[7]

> The law also presumes that a person intends the ordinary consequences of his voluntary act.
>
> Therefore, if you find beyond a reasonable doubt that the defendant . . . voluntarily and unlawfully assaulted or injured Lana Harding, and if you further find beyond a reasonable doubt that the death would result as the ordinary consequence of such an assault or injury, the law presumes that, and expressly directs you to reason therefrom that the defendant intended to cause said death regardless of whether or not he actually had such an intent or purpose.

Add'l Instr. No. 33, App. at 1584. Similarly, with respect to kidnapping, the jury was instructed:

> If you find beyond a reasonable doubt that the defendant . . . without lawful authority, restrained Lana Harding . . . the law presumes that he acted therein with an unlawful intent, purpose or knowledge, and expressly directs you to so reason.
>
> This . . . is . . . a rebuttable presumption subject to being controverted and overcome by other evidence. . . .

Add'l Instr. No. 35, App. at 1585 to 66. In all, McKenzie asserts that 14 instructions violated *Sandstrom*.

5. McKenzie argues that the jury could have interpreted Additional Instruction 30 as calling for a conclusive presumption of intent once it determined that McKenzie was sane when he committed the crimes charged. *See* Add'l Instr. No. 30, App. at 1562. However, the jury was charged that all presumptions were rebuttable unless otherwise indicated. Reading these instructions together, as we must, we find no irrebuttable presumptions. *See Francis v. Franklin*, 471 U.S. 307, 318-19, 322-23 n. 8, 105 S.Ct. 1965, 1973-74, 1975-76 n. 8, 85 L.Ed.2d 344 (1985) (ambiguity in one instruction may be cured by sufficiently clear language in other portions of jury charge); *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973) ("a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge"). Of course, the fact that the presumption was rebuttable does not render it any less erroneous.

6. The dissent contends that we disregard this test, examining instead whether the jury in fact relied on the improper instructions. *See post* at 1550-51. This is simply not so. As we demonstrate below, the facts found by the jury *without* reliance on the tainted instructions demonstrate beyond a reasonable doubt that the jury could not have reached a different conclusion on the issue of intent even if it had been properly instructed. Thus, even if the jury *did* rely on the improper instructions, the error was harmless.

7. McKenzie and the dissent attempt to distinguish *Clark* by noting that it involved only one erroneous instruction, whereas multiple errors were committed at McKenzie's trial. This distinction is irrelevant. While the presence of multiple erroneous instructions may make it more likely that the unconstitutional presumption played a material role in the jury's decision, it has no bearing on whether the result would have been the same even absent the *Sandstrom* errors. Since even one *Sandstrom* instruction requires a reviewing court to assume that the jury in fact relied on the improper presumption in reaching its verdict, multiple *Sandstrom* instructions cannot compound the error. We reject the dissent's apparent suggestion that the nature of our inquiry varies with the number of erroneous instructions.

[2-6] Once an error of constitutional magnitude is shown, the state has the burden of establishing beyond a reasonable doubt that the error was harmless. *Chapman*, 386 U.S. at 24, 87 S.Ct. at 828. The Montana Supreme Court and the district court considering McKenzie's habeas corpus petition both concluded that the state had met its burden. *McKenzie III*, 608 P.2d at 459; Mem. op. at 19 (D.Mont. Aug. 16, 1985), E.R. 58 at 19. In cases involving petitions for habeas corpus we review a district court's determinations de novo. *Herd v. Kincheloe*, 800 F.2d 1526, 1528 (9th Cir.1986). Moreover, the ultimate determination of whether *Sandstrom* error was harmless is also subject to de novo review as a question of federal constitutional law. *Herd*, 800 F.2d at 1528; *see also Rushen v. Spain*, 464 U.S. 114, 120, 104 S.Ct. 453, 456, 78 L.Ed.2d 267 (1983) (per curiam). However, the factual findings underlying the state court's determination of harmless error are entitled to a presumption of correctness under 28 U.S.C. § 2254(d) (1982). *Rushen*, 464 U.S. at 120, 104 S.Ct. at 456. We must defer to such state court factual findings "in the absence of 'convincing evidence' to the contrary," *id.*, and may set them aside only if they "lac[k] even 'fair support' in the record." *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S.Ct. 843, 850, 74 L.Ed.2d 646 (1983).[8]

2. In the case before us, the jury found beyond a reasonable doubt, without relying on any unconstitutional presumptions, that McKenzie kidnaped, tortured and killed Lana Harding. Thus, the determinative issue is whether the facts found by the jury compel the conclusion that McKenzie acted with the requisite criminal intent in committing these acts.

McKenzie offered no evidence bearing directly on his intent. Instead, "[t]he 'defense at trial focused entirely on the issue of mental competence, relying on the traditional insanity defense as well as the defense of diminished capacity.'" Appellant's Petition for Rehearing at 1 (quoting *McKenzie v. Risley*, 801 F.2d 1519, 1525 (9th Cir.1986)).[9] With respect to mental capacity, Dr. Wetzler, the defense psychiatrist, testified that McKenzie was incapable of forming the requisite intent because he lacked mental capacity. From this McKenzie concludes that the *Sandstrom* errors could not possibly have been harmless beyond a reasonable doubt, because in order to reach such a conclusion a reviewing court would be required to weigh the credibility of the respective expert witnesses. *See, e.g., Bowen v. Kemp*, 832 F.2d 546, 551 (11th Cir.1987) (en banc) (where there is substantial evidence that defendant may have lacked requisite intent, *Sandstrom* error cannot be harmless on the ground that the evidence of intent is overwhelming).

[7] We have given this argument careful consideration but remain unpersuaded. That a defendant contested intent does not automatically render the *Sandstrom* error prejudicial. *Rose v. Clark* is precisely on point. Defendant there raised the defenses of insanity and lack of mental capacity, and introduced expert and other testimony to show that he was insane, that he suffered from amnesia and could not remember the events of the crime, and that he had been drinking heavily before the alleged criminal activity. 106 S.Ct. at 3104. The trial court's instruction placed on the defendant the burden of disproving "malice," which was defined as "an intent to do any injury

8. The Montana Supreme Court found that the evidence proved beyond a reasonable doubt that McKenzie acted purposely or knowingly when he kidnaped, tortured and killed Lana Harding. *McKenzie II*, 581 P.2d at 1224, and that no reasonable juror could have found otherwise. *McKenzie III*, 608 P.2d at 459. It is clear that the presumption of correctness applies to state appellate court findings of intent. *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 697-98 & n. 5, 88 L.Ed.2d 704 (1986), *overruled in part on other grounds, Pope v. Illinois*, — U.S. —, 107 S.Ct. 1918, 1922 n. 7, 95 L.Ed.2d 439 (1987).

9. McKenzie also attempted to raise a reasonable doubt in the jurors' minds as to the identity of the perpetrator of the crime. However, the jury indisputably found beyond a reasonable doubt that McKenzie committed the acts at issue.

to another." *Id.* The Supreme Court stated:

> The [Court of Appeals] concluded that a *Sandstrom* error could never be harmless where a defendant contests intent. . . . But our harmless error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that "*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless." *United States v. Hasting*, 461 U.S., at 509, n. 7, 103 S.Ct., at 1981, n. 7. The question is whether, "on the whole record . . . the error . . . [is] harmless beyond a reasonable doubt." *Id.*, at 510, 103 S.Ct., at 1981. *Id.* at 3109 (citation omitted).[9]

[8] There are a variety of ways in which a jury can develop a reasonable doubt about whether a defendant had the requisite intent. One possibility is for the jury to conclude that the defendant lacked the mental capacity to form intent or, more precisely, that there is reasonable doubt on that issue. Alternatively, the jury might find intent lacking because of some other circumstance, for example, that defendant was acting as a result of mistake or accident, or in the heat of passion, or (as to specific intent) under the influence of alcohol or drugs. Our function under *Clark* is to determine whether the jury in McKenzie's case could have developed a reasonable doubt about intent on any of these theories, had it "never heard the impermissible instruction[s]." *Pope*, 107 S.Ct. at 1922 n. 6.

a. Because McKenzie specifically raised diminished capacity as a defense, we consider that issue first. Defendant's evidence that he lacked capacity to form the requisite intent consisted solely of the testimony of Dr. Wetzler, a forensic psychiatrist. Dr. Wetzler repeatedly testified that McKenzie, at the time he committed the acts in question, lacked the capacity to form the states of mind that were elements of the offenses charged. R.T. at 2255, 2268–69, 2581.[11] An examination of the jury instructions reveals that the jury *necessarily* rejected this testimony beyond a reasonable doubt in reaching its verdict.[12]

[9] Although numerous instructions informed the jury that it could presume intent from conduct, one clear and explicit exception was made to this general rule. The crimes of aggravated kidnaping and deliberate homicide by means of torture were, as defined for the jury, essentially specific intent crimes. Each required the jury to find that the defendant purposely committed the underlying criminal acts and did so for some further "particular purpose." [13] And, with respect to those "particular purposes," the jury was instructed that it *could not rely on any presumptions* in finding that the defendant acted with the requisite mental state; rather, it was required to reason by inference from the established facts.[14] The jury found that McKenzie committed both of these specific intent crimes, and we must presume that it followed the applicable instructions in doing so. *Francis*, 471 U.S. at 324–25 n. 9, 105 S.Ct. at 1976–77 n. 9; *Parker v. Randolph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979) (opinion of Rehnquist, J.). Accordingly, the jury must have found, without relying on the unconstitutional presumptions,[15] that McKenzie acted with the requisite "particular purposes" in mind when he committed his crimes.[16] In reaching this conclusion the jury necessarily found that McKenzie was capable of forming specific criminal intent.

[10] Dr. Wetzler never differentiated between specific and general intent. Rather, he stated categorically that McKenzie lacked the capacity to form *any* of the requisite mental states. Thus, there would have been no basis on which the jury could rationally find that McKenzie possessed the mental capacity to form, and act upon, a "particular purpose," yet at the same time lacked the capacity to act "purposely or knowingly."[17] In finding that McKenzie

9. *Clark* implicitly overrules our cases holding that harmless error analysis is inapplicable where the defendant contests intent. *See, e.g., Church v. Kincheloe*, 767 F.2d 639, 642 (9th Cir.1985), *cert. denied*, — U.S. —, 106 S.Ct. 3339, 92 L.Ed.2d 743 (1986); *Hagler v. Callahan*, 784 F.2d 711, 714 (9th Cir.1985); *In re Hamilton*, 721 F.2d 1189, 1191 (9th Cir.1983). We explicitly overrule them today. *Bowen v. Kemp*, 832 F.2d 546 (11th Cir.1987), is not to the contrary. In that case the court held that "[w]hen intent is at issue, . . . we cannot infer overwhelming evidence of intent directly from the physical sequence that resulted in the victim's death. We must also look at the evidence of defendant's state of mind." *Id.* at 551. Although the *Bowen* court found that the evidence of mental incapacity in that particular case was sufficiently substantial to preclude a finding of harmless error, this is necessarily a fact-bound inquiry, and the result will vary depending on the particular circumstances of each case. The *Bowen* court, moreover, recognized that the defendant's conduct was ambiguous, *id.*, thereby casting further doubt on defendant's intent. *Bowen* does not attempt to fashion a *per se* rule of the type created by *In re Hamilton*, 721 F.2d at 1191, and explicitly disapproved by the Supreme Court in *Clark*.

11. Dr. Wetzler expressed related concepts elsewhere in his testimony. R.T. at 2261 ("[McKenzie] has no behavior control. . . . He didn't know what he was doing"); *id.* at 2299 ("I don't feel [McKenzie] appreciated he knew [sic] what he was doing"); *see also id.* at 2304.

12. The jury also rejected Dr. Wetzler's testimony that McKenzie was insane. We draw no inferences from this fact, however, because the burden of proof as to insanity was on the defendant under a preponderance of the evidence standard. The jury therefore need not have found beyond a reasonable doubt that McKenzie was sane.

13. In order to convict McKenzie of aggravated kidnaping, the jury was told it had to find that he committed the kidnaping "for the *particular purpose* of facilitating the commission of a felony: either sexual intercourse with Lana Harding without her consent, or to commit an Aggravated Assault on her." Add'l Instr. No. 36, App. at 1566 (emphasis added). On the charge of deliberate homicide by means of torture, the jury had to find that McKenzie

> purposely assaulted Lana Harding physically and inflicted cruel suffering upon her and in so doing caused her death . . . for one or more of the *particular purposes* charged; either, (a) to extort something from her, or (b) to persuade her to do something against her will, or (c) to satisfy some other untoward propensity of the defendant.

Add'l Instr. No. 34, App. at 1565 (emphasis added). "Purpose" was defined for the jury as a "conscious object to engage in [certain] conduct or to cause [a certain] result." Instr. No. 10, App. at 1558.

14. Additional Instruction 32 stated: "In offenses which require proof of a particular purpose the particular purpose required may never be proved by means of legal presumptions, but must be proved by means of inferences only." App. at 1563–64. Similarly, Additional Instruction 34 stated: "The mental state of purposely assaulting another physically . . . cannot be proved by using the legal presumptions you have been directed to use in the proof of deliberate homicide, and must be proved by the use of inferences alone." App. at 1565. *See also* Add'l Instr. No. 36, App. at 1566 (aggravated kidnaping).

15. McKenzie argues that the instructions were ambiguous, and that the jury might have believed it could rely on the improper presumptions in finding "particular purposes." We cannot agree. The judge's instructions on this point were crystal clear and we do not see how any rational juror could have misinterpreted them. McKenzie relies on the fact that one of the "particular purposes" that could have justified a finding of aggravated kidnaping involved "facilitating the commission of a felony," Add'l Instr. No. 36, App. at 1566, and that the jury was elsewhere instructed that it could rely on the unconstitutional presumptions in finding that the defendant committed either of the applicable underlying felonies. No reasonable juror would have followed this tortured chain of reasoning to conclude that the presumptions could be applied in finding the particular purposes when the judge had expressly and unambiguously stated to the contrary. In any event, no similar objection can be raised to the implicit finding of mental capacity underlying the conviction for deliberate homicide by means of torture.

16. The dissent concludes from this analysis that "the majority adopts the state's view that the jury must have considered the 'particular purpose' element before the 'knowingly and purposely' element." *Post* at 1554. We disavow this characterization. The order in which the jury considered these two elements is irrelevant. The point is that the instructions unambiguously prohibited reliance on the presumption in finding the "particular purposes," and thus we know that the jury found these purposes, and the capacity to form them, without reliance on the unconstitutional presumption. The dissent's argument—that the finding that McKenzie acted "knowingly and purposely" somehow "tainted" the finding that he acted in furtherance of "particular purposes"—is inconsistent with our responsibility to presume that the jury followed its instructions.

17. A finding of capacity to form specific intent necessarily encompasses a finding of capacity to form general intent, since the former requires

had the capacity to form the requisite specific intent, the jury necessarily rejected Dr. Wetzler's testimony on this point,[18] and instead accepted the testimony of the prosecution's witnesses that McKenzie was capable of forming general and specific criminal intent.[19]

In response to this line of reasoning, which was adopted by the district court, McKenzie argues that the jury was in fact told it could presume his mental capacity to form criminal intent. He points to Additional Instruction 30, which states:

> The knowledge or purpose with which an act is done is manifested by the circumstances connected with the offense and the sound mind of the accused. All persons are of sound mind who are not afflicted with a disease or defect of the mind which excludes responsibility for their conduct.
>
> Upon the trial of the issues raised by the pleas of "Not Guilty" to the charges made in the Information, the defendant is presumed to have been free from any disease or defect of the mind which excludes responsibility for his conduct at the time the offenses are alleged to have been committed and to be [free from any disease or defect of the mind which excludes his responsibility] now.[20]

App. at 1562. McKenzie contends that, by creating a presumption that "[a]ll persons are of sound mind," this instruction permitted the jury to presume not merely that the defendant was sane but that he possessed the mental capacity to form intent as well.

Additional Instruction 30 cannot be read so broadly. Taken in context, it is clear that the presumption applies solely to defendant's "responsibility for his conduct," Montana's formulation of legal sanity. The jury was carefully instructed that the insanity defense is an affirmative defense that "goes only to the mental responsibility and control of the defendant," Add'l Instr. No. 53, App. at 1571, and that a defendant's criminal responsibility is presumed. The *only* reference in the instructions to mental capacity occurs at the end of Instruction 53:

> the higher degree of mental awareness and cognitive ability. It is for this reason that certain factors, such as intoxication, can affect a defendant's capacity to form specific intent while leaving intact his capacity to form general intent. *See, e.g., State v. Lukus*, 149 Mont. 45, 423 P.2d 49, 53 (1967) (intoxication is a defense to crimes requiring specific intent or "particular purpose," but not to general intent crimes).

18. McKenzie points to the following testimony of Dr. Wetzler as support for his assertion that the jury could have found mental capacity to form specific intent without rejecting Dr. Wetzler's testimony as to capacity to form general intent:

> Q [Mr. Reagan, defense counsel] And the Court provided you with certain definitions that it has heretofore given to the jury?
>
> A I presume so, yes. I have a copy of o[sic].
>
> Q And among these are purposely and knowingly?
>
> A Yes; purposely defined on page 8 [App. at C-9, at 1558].
>
> Q Starts on page 8?
>
> A Yes.
>
> Q And describes [knowingly] there, and part of this definition is when knowledge of the particular act [is an] element of [the] offence [sic], such knowledge is established, if a person is aware of [a] high probability of its existence. Is this defendant capable of [a] high probability of knowledge?
>
> A No.
>
> Q Existence of that type of fact in that type of situation?
>
> A Which one are you reading, Mr. Reagan?
>
> Q Top of page 9 [App. at 1559 (KNOWINGLY Defined)]
>
> . . . .
>
> A I do not feel that he was aware of what he was doing.

R.T. at 2578.

We fail to understand how this unadorned reference to the definition of "knowingly" supports McKenzie's argument.

19. The fact that the jury rejected the only evidence of mental incapacity distinguishes this case from the Eleventh Circuit's ruling in *Bowen v. Kemp*, 832 F.2d 546, where there was substantial evidence to support a finding of mental incapacity and the jury had no occasion to resolve the issue.

20. The instructions as read to the jury contained the bracketed language indicated in the second paragraph of Instruction 30. R.T. of Tape of Instructions at 2; *cf.* R.T. at 2601. The written instructions contained, in place of this language, the word "sane." Regardless of which alternative the jury actually relied on, our analysis remains the same.

> If you find beyond a reasonable doubt that the defendant did do [the acts charged] or any of them you must then consider whether or not the defendant has overcome the presumption of accountability and whether or not he has created a reasonable doubt in your minds as to his mental accountability and responsibility for any of the acts you may find he committed, *and whether or not he could have had the requisite mental state for the act or acts which you have found he committed.*

Id. (emphasis added).

This instruction makes clear that the defendant's capacity to form the requisite mental state is an issue distinct from his legal sanity or "responsibility." The jury was elsewhere instructed that the prosecution bore the burden of proving each element of the crime beyond a reasonable doubt. Instr. No. 6, App. at 1567; Add'l Instr. No. 39, App. at 1558. The jury properly resolved the issue of mental capacity without the benefit of any presumptions.

[11] b. Once we have determined that the jury must have rejected McKenzie's diminished capacity defense, we have little difficulty concluding it could not have developed a reasonable doubt as to intent on any other basis. The largely undisputed facts presented at trial provide no support for any other result. There is no possibility, for example, that the jury might have found that McKenzie's acts were committed accidentally, by mistake, in the heat of passion or under the influence of drugs or alcohol, and defendant never attempted to raise any of these defenses.

McKenzie kidnaped Lana Harding from the teacherage and dragged her to his truck. *McKenzie III*, 808 P.2d at 435; R.T. at 594–95, 1401–03, 1661–63, 1992–93, 2118–20, 2175–82. He strangled her by tightening and loosening a rope around her neck. R.T. at 585–90. He beat her severely and repeatedly on the head, inflicting several wounds that fractured and partially crushed her skull and penetrated to her brain. R.T. at 562–67, 570, 577–79, 581–82. The most severe of these blows exposed "multiple pieces of bone and brain" tissue, R.T. at 577–78, and she died within minutes of receiving this injury, R.T. at 564, some 30 to 45 minutes after she was strangled. R.T. at 586, 606. These criminal acts took place over a relatively long period of time and at different locations; they involved a variety of actions wholly inconsistent with any state of mind other than intentional conduct. The sophisticated and complex nature of the crime, the multiple and varied forms of criminal acts committed, and the duration of the activity foreclose any alternative explanations.[21]

No reasonable juror, after being presented with this uncontroverted evidence, and after finding that McKenzie was sane and possessed the requisite mental capacity, could have failed to find that he acted with intent when he committed the brutal assault on Ms. Harding. *See Sturgis v. Goldsmith*, 796 F.2d 1103, 1107 (9th Cir. 1986) (*Sandstrom* error harmless where defendant announced his intention to kill and "accomplished this aim gradually over a one and a half hour period, using strangling when stabbing appeared to be ineffective and later returning to the stabbing technique"); *Hagler*, 764 F.2d at 715–16 (*Sandstrom* error harmless where "victim was shot three times, twice in the head, and one of the shots was fired at point-blank range"); *McGuinn v. Crist*, 657 F.2d 1107, 1108 (9th Cir.1981) (*Sandstrom* error harmless where victim "was shot four times in the head at close range firmly negating any reasonable possibility that the killing occurred as a result of recklessness or negligence"), *cert. denied*, 455 U.S. 990, 102 S.Ct. 1614, 71 L.Ed.2d 850 (1982). We "'find that the record developed at trial established guilt beyond a reasonable doubt....'" *Pope v. Illinois*, 107 S.Ct. at 1922 (quoting *Rose v. Clark*, 106 S.Ct. at 3107). We therefore hold that the *Sandstrom* errors were harmless.

21. There was no evidence that McKenzie was intoxicated or under the influence of a drug that might have affected his ability to form intent.

B. *Imposition of Death Sentence After Approval of Plea Bargain*

On Sunday, December 22, 1974, approximately two and one-half weeks before McKenzie's trial was scheduled to begin, the prosecution and defense counsel reached a tentative agreement permitting McKenzie to plead guilty to two of the charged offenses in exchange for receiving a fifty-year sentence. On the following day, counsel for McKenzie and the state met with the trial judge who reluctantly approved the proposal and set December 30 as the date to receive the plea. On the evening of December 23, the attorneys met again and defense counsel left the meeting believing that a final binding agreement had been reached. The prosecutors, on the other hand, had the impression that the plea agreement was contingent on obtaining the approval of the victim's family. That contingency was not satisfied and on December 28 the prosecution advised defense counsel that there would be no deal. The defendant later offered on the record to plead guilty as contemplated by the plea agreement, but the state objected and, accordingly, no guilty plea was entered.[22]

McKenzie contends that the principle of *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), applied by this court in *United States v. Stockwell*, 472 F.2d 1186 (9th Cir.), *cert. denied*, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973), renders unconstitutional the imposition of a sentence of death on a defendant who would have received a prison sentence had he pled guilty. We are unpersuaded.

Jackson struck down the death penalty portion of the Federal Kidnaping Act, 18 U.S.C. § 1201(a). That statute, as construed by the Supreme Court, gave the jury discretion to sentence to death any defendant convicted of violating its provisions, but provided for a maximum sentence of life imprisonment in the event a defendant pled guilty or waived his right to a jury trial. 390 U.S. at 581, 88 S.Ct. at 1216. The Court held that this statute created an unconstitutional burden on a defendant's "Fifth Amendment right not to plead guilty and ... Sixth Amendment right to demand a jury trial," *id.* (footnote omitted), and therefore was unconstitutional because it unfairly coerced guilty pleas and jury waivers. *Id.* at 583, 88 S.Ct. at 1217.

[12, 13] McKenzie's situation is precisely the converse. He would have us hold constitutionally infirm a process that discouraged a guilty plea and jury waiver and encourage him to exercise his constitutional rights. Defendants have no constitutional right to plead guilty to lesser crimes than those charged, *see Mabry v. Johnson*, 467 U.S. 504, 507–08 & n. 5, 104 S.Ct. 2543, 2546–47 & n. 5, 81 L.Ed.2d 437 (1984), or to avoid trial. Therefore, none of McKenzie's constitutional rights were burdened when the state refused to go through with the proposed plea agreement. Moreover, the statutory scheme under which McKenzie was convicted did not provide for differing treatment for those who pled guilty and those who exercised their right to a jury trial. In either case, the full range of sentencing options was available to the sentencing judge. *Jackson* simply does not apply.[23]

22. In his federal habeas petition, McKenzie claimed that his right to a fair trial was violated when the trial court declined to enforce the plea agreement despite alleged prejudice to the defendant by virtue of the revelation of certain information to the prosecutors in the course of plea negotiations. This contention was rejected by the district court and by the panel that heard the appeal initially. 801 F.2d at 1527–28. While McKenzie did not raise this point in his petition for rehearing, we approve of the panel's resolution of this issue.

23. In *Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), the Court upheld a sentencing scheme mandating life sentences upon conviction of defendants who might have received lesser sentences by pleading *nolo contendere* to the same charge, and distinguished *Jackson*, on the ground, inter alia, that *Jackson* involved the death penalty, a punishment "'unique in its severity and irrevocability.'", *Id.* at 217, 99 S.Ct. at 496 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976)). McKenzie argues that *Corbitt* supports his position by requiring additional safeguards for defendants who have been sentenced to death. While it is true that this case, like *Jackson*, involves the death penalty, it is also true—and dispositive—that McKenzie's rights not to plead guilty and to have a jury trial were not in any way burdened. The rule in *Jackson* depends on more than the fact that the death penalty was imposed on a defendant who might have escaped that penalty through a plea agreement. Only when the exercise of constitutional rights is made unduly burdensome does *Jackson* apply.

McKenzie's reliance on *Stockwell* is equally misplaced. An examination of the reasoning in *Stockwell* illustrates how inapplicable *Jackson* is to McKenzie's situation. In *Stockwell*, the trial court told the defendant that he would receive one sentence if he agreed to plead guilty and another, longer, sentence if he was convicted after a trial. Defendant elected to go to trial and, after conviction, the judge gave him the promised longer sentence. On appeal, this court explained the application of *Jackson*:

> [O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given *the failure to plead guilty*. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as *punishment for his refusal to plead guilty*.

472 F.2d at 1187–88 (emphasis added). McKenzie did not refuse to plead guilty; instead, he made an offer on the record to do so. It is therefore impossible to see in what sense the trial court might have desired to "punish" him in violation of *Jackson*. The record discloses without contradiction that the judge sentenced McKenzie based on the facts of the case and his personal history. *See* pp. 1541–42 *infra*.

[14] It is no doubt true that a sentence of death must "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (plurality opinion). That the sentence imposed after trial is more severe than one the judge would have been willing to impose as part of a plea bargain does not, however, impeach the legitimacy of the sentence. In the first place, the judge could well have approved a settlement calling for a sentence lighter than he himself would have chosen to impose. Moreover, in the interval between the plea negotiations and the sentencing proceedings, the trial judge had numerous opportunities to gain additional information upon which to base his sentencing decision. He presided over McKenzie's sixteen-day-long trial; heard the testimony of fifty prosecution witnesses, including witnesses who testified in great detail about the brutality of the crime, McKenzie's apparent premeditation and other aggravating factors; read the presentence investigation report; and, most important, received a unanimous jury verdict finding the defendant guilty beyond a reasonable doubt of two of the most heinous crimes punishable under Montana law.[24]

[15] These facts sufficiently explain the trial judge's decision, and his written findings set out with compelling force the rationale for the sentence he imposed. McKenzie points to no evidence tending to show an alternative, improper, basis for the sentence, and we find no basis for his objections in that regard.[25]

24. The trial transcript, excluding voir dire, is over 2,000 pages long. This fact alone belies appellant's claim that the trial judge "was aware of the facts of Duncan McKenzie's crime well before the hour long meeting where he agreed to impose a prison sentence on his plea." Amended Supplemental Brief of Appellant on Rehearing *En Banc* at 36–37. As support for this counterintuitive assertion, McKenzie relies solely on a portion of the transcript of the pretrial proceedings indicating that the judge had seen two photographs of Lana Harding's savagely beaten body. *Id.* (citing R.T. at 23–24). This does not come close to raising an inference of capriciousness or vindictiveness in sentencing.

25. In his final brief on rehearing, appellant argues that the trial court violated the principle of *Booth v. Maryland*, — U.S. —, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), by permitting the wishes of the victim's family "to control Duncan McKenzie's fate." Second Supplemental Brief of Appellant on Rehearing *En Banc* at 18. Although there is no evidence that the trial judge improperly considered the impact of the crime on the victim's family in making his sentence determination, McKenzie contends that merely

C. *Constitutionality of the Montana Death Penalty Statutes*

McKenzie challenges the constitutionality of the Montana statutes under which he was sentenced to death.[25] This challenge presents a question of federal constitutional law that we review de novo. *LaDuke v. Nelson*, 762 F.2d 1318, 1322 (9th Cir.1985); *United States v. McConney*, 728 F.2d 1195, 1202–03 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

[16] Procedures for imposing the death penalty must conform to certain guidelines. First, and most fundamentally, the discretion of the sentencer "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (plurality opinion); *see also Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Initially, at the stage of legislative definition, the state must carefully delimit by statute the classes of crimes for which the death penalty is a permissible punishment. *Zant v. Stephens*, 462 U.S. 862, 877–78, 103 S.Ct. 2733, 2742–43, 77 L.Ed.2d 235 (1983). Thereafter, at the sentence selection stage, each defendant convicted of a capital offense must have a full opportunity to present the sentencer with evidence in mitigation of his crime. *Eddings v. Oklahoma*, 455 U.S. 104, 110, 112, 102 S.Ct. 869, 874, 875, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.). This permits the requisite individualized determination of the appropriate sentence in light of all factors relevant to the particular case and defendant. *Zant v. Stephens*, 462 U.S. at 879, 103 S.Ct. at 2744.

[17] The second requirement is that there be review of the sentence by a court of statewide jurisdiction to ensure that the sentence has not been imposed in an arbitrary manner and is not disproportionate to the underlying crime.[27] *See, e.g., Zant*, 462 U.S. at 876, 103 S.Ct. at 2742; *Proffitt v. Florida*, 427 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976) (plurality opinion); *Gregg*, 428 U.S. at 198, 96 S.Ct. at 2937.

McKenzie raises three arguments in support of his contention that the statutes under which he was sentenced are unconstitutional. First, he asserts that they fail to guide sufficiently the discretion of the sentencer because they do not adequately narrow the class of capital-eligible defendants. Next, he claims that the sentencing procedures employed in his case were ad hoc and judge-created, lacking the constitutionally required safeguards against arbitrariness in the imposition of death sentences. Finally, he challenges Montana's sentencing review system, at least insofar as it was applied to him.

letting the family influence the decision to bring him to trial introduced an impermissible element of arbitrariness.

The Montana state district court, like trial courts elsewhere, had no power to control the prosecutor's decision whether to plea bargain. To the extent the victim's family's wishes were given any consideration, it was in the decision to take the case to trial, not in sentencing. We see no impropriety in that.

26. McKenzie was sentenced pursuant to R.C.M. §§ 94-5-105 and 94-5-304 (1947), which at the time of Lana Harding's death provided:

> **94-5-105. Sentence Of Death For Deliberate Homicide.** (1) When a defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:
>
> (a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
>
> (b) The defendant was previously convicted of another deliberate homicide; or
>
> (c) The victim of the deliberate homicide was a peace officer killed while performing his duty; or
>
> (d) The deliberate homicide was committed by means of torture; or
>
> (e) The deliberate homicide was committed by a person lying in wait or ambush; or
>
> (f) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.
>
> 94-5-304. **Sentence Of Death For Aggravated Kidnapping.** A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as the result of the criminal conduct unless there are mitigating circumstances.

27. The Constitution does not require that state court review of death sentences include a comparison of sentences imposed in similar cases. *Pulley v. Harris*, 465 U.S. 37, 43–51, 104 S.Ct. 871, 875–80, 79 L.Ed.2d 29 (1984). Such "comparative proportionality review" is merely one additional safeguard against arbitrariness in sentencing. *Id.* at 51, 104 S.Ct. at 880.

1. *Sentencing Discretion*

[18] Under Montana law at the time of Lana Harding's death, the crime of deliberate homicide was punishable by death or imprisonment for a term of years. However, the death penalty was reserved for a specifically enumerated subclass of deliberate homicides.[28] In addition, the death penalty could be imposed for aggravated kidnaping, but only if the victim died as a result of the defendant's criminal conduct.[29] The jury found that McKenzie committed deliberate homicide "by means of torture," one of the six types of homicide punishable by death, and that he also committed aggravated kidnaping. The jury further found that Lana Harding died as a result of the aggravated kidnaping.

McKenzie contends that these statutes are unconstitutional under *Gregg* and *Furman* because they do not contain, in addition to a description of the basic elements of the crime, a list of aggravating circumstances that must be found before death may be imposed in an individual case. This is not so. Under Montana law at the time of McKenzie's crime, there was a large class of deliberate homicides and aggravated kidnapings punishable by imprisonment and only a much narrower class punishable by death. The applicable statutes precisely specified the elements that had to be found in addition to mere deliberate homicide or aggravated kidnaping in order to justify imposition of the death penalty.

McKenzie points out that the information charging him described each crime in a way that essentially included the additional factors as elements of the crime to be considered at the guilt phase of the trial rather than as distinct aggravating factors to be considered at the sentencing phase. This is not constitutionally significant. As the Supreme Court held recently,

> The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), establishes this point.

Lowenfield v. Phelps, — U.S. —, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988). Just as in *Lowenfield* and *Jurek*, the findings required by the Montana statutes—that McKenzie tortured and caused the death of Lana Harding—were adequate to place his crimes within the narrow class of offenses for which the death penalty may be appropriate.[30]

McKenzie also argues that the actual aggravating circumstances found in his case do not "genuinely narrow the class of persons eligible for the death penalty [or] reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742. With respect to the circumstance of torture, he relies on *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), which involved a statute that provided for imposition of the death penalty if the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* at 422, 100 S.Ct. at 1762. This aggravating circumstance was

28. R.C.M. §§ 94-5-101, -102, -105 (1947).

29. R.C.M. §§ 94-5-303, -304 (1947).

30. McKenzie relies on *Collins v. Lockhart*, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S.Ct. 546, 88 L.Ed.2d 475 (1985), for the proposition that an aggravating circumstance which is an element of the crime cannot be said to narrow adequately the class of persons who may be sentenced to death. We read *Collins* as grounded in the peculiar statutory scheme employed by Arkansas to define capital murder. In any event, we note that *Collins* did not discuss *Jurek* and was decided prior to *Lowenfield*. We must, of course, resolve any conflict in favor of *Lowenfield* and *Jurek*.

held not unconstitutional on its face in *Gregg v. Georgia*, 428 U.S. at 201, 96 S.Ct. at 2938. The *Gregg* Court stated that an overly broad reading of that language might not pass constitutional muster, but that a construction that limited it to "torture-murder" would be constitutionally permissible. *Id.*

In *Godfrey*, the Georgia Supreme Court upheld a death sentence based solely on this aggravating circumstance. However, the trial judge in *Godfrey* explicitly found that the victims had not been tortured, and the prosecutor told the jury that no allegations of "torture" or "aggravated battery" were being made. 446 U.S. at 426, 100 S.Ct. at 1763. The Supreme Court vacated the sentence on the ground that the remaining language—"outrageously or wantonly vile, horrible or inhuman"—insufficiently narrowed the class of murderers to whom the death penalty could be applied. *Id.* at 428–29, 432–33, 100 S.Ct. at 1764–65, 1766–67. *Godfrey* therefore does not deal at all with torture as an aggravating circumstance and *Gregg*'s general approval of this type of statute controls.

The homicide statute under which McKenzie was sentenced required a finding that the victim's death was caused "by means of torture." The trial court defined this crime to the jury in clear and explicit terms,[31] and the Montana Supreme Court approved this definition on appeal. *McKenzie III*, 608 P.2d at 445. Far from reading torture out of the statute, as was the case in *Godfrey*, the Montana courts have defined the term in a manner that narrows the class of murderers qualifying for the death penalty and guides the jury in its selection of those persons who fit within that class. *Cf. Barclay v. Florida*, 463 U.S. 939, 968, 103 S.Ct. 3418, 3434, 77 L.Ed.2d 1134 (1983) (Stevens, J., concurring in the judgment) (approving application of aggravating circumstance that crime was "especially heinous, atrocious, or cruel" to case where victim "was knocked to the ground and repeatedly stabbed by [the defendant] as he writhed in pain begging for mercy").

McKenzie's argument as to aggravated kidnaping is no more availing. Under the applicable Montana statute, the jury was required to find that McKenzie kidnaped Lana Harding with specific intent to commit one of five further wrongful acts, and the death penalty could be imposed only if the jury found—as it did—that Ms. Harding died as a result of his criminal conduct. R.C.M. §§ 94-5-303, -304. McKenzie contends that this crime is nothing more than felony murder, and thus is not sufficiently narrow to permit consideration of the death penalty for all persons who are found guilty of committing it. He points to the numerous death sentences for felony murder that were struck down in *Furman* and its companion cases as support for his contention.

McKenzie's reliance on *Furman* and its companion cases is misplaced. None of the statutes at issue there provided for the full panoply of protections against arbitrariness in sentencing that the Supreme Court has held constitutionally required. Moreover, the Supreme Court has upheld the constitutionality of the death sentence for felony murder where the defendant killed, attempted to kill or intended that lethal force be used.[32] *See, e.g., Cabana v. Bullock*,

31. The jury instructions stated:

> Whoever purposely assaults another physically for the purpose of inflicting cruel suffering upon the person so assaulted for the particular purpose of enabling the assailant to either:
>
> (a) extort anything from such person;
>
> (b) or to persuade such person against his or her will, or
>
> (c) to satisfy some other untoward propensity of the assailant,
>
> and in so doing the assailant causes the death of the person he assails, in the law is guilty of the offense of Deliberate Homicide by Means of Torture, whether or not it was the purpose or intention of the assailant to cause such death.
>
> "Untoward Propensity" means any perverse, wrong, bad or corrupt inclination or tendency.

Instr. No. 23, App. at 1559–60; *see also* Add'l Instr. No. 34, App. at 1565.

32. As indicated above, the Montana Supreme Court found beyond a reasonable doubt that McKenzie purposely or knowingly killed Lana Harding. *See* note 8 *supra*.

106 S.Ct. at 696–97, 700 (permitting imposition of death sentence if state court first made required findings of culpability in robbery felony murder case); *Jurek v. Texas*, 428 U.S. at 268, 270, 96 S.Ct. at 2955 (kidnaping-rape felony murder); *Gregg v. Georgia*, 428 U.S. at 160–61, 96 S.Ct. at 2919 (aggravating circumstances found were that murders were committed in course of robbery and for the purpose of furthering robbery). Whether denominated felony murder or aggravated kidnaping resulting in death, the crime of which McKenzie was convicted was narrowly defined, and its distinguishing characteristics sufficiently justified imposition of the death penalty.

2. *Sentencing Procedures*

[19] In convicting McKenzie, the jury returned written findings of two statutory aggravating circumstances. The sentencing judge approved these findings, concluding that McKenzie committed a "brutal, conscienceless, torture, rape and deliberate killing of a human being," that the murder was committed during the commission of a felony, that the defendant had a prior conviction for a violent crime and was both "dangerous and potentially dangerous," and that rehabilitation of the defendant was impossible.[33] Findings, Conclusions, Sentence and Order of Montana District Court, E.R. 33 (App. V) at 7–9 [hereinafter State Court Findings].

As the plurality noted in *Jurek*,

> a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson v. North Carolina*, [428 U.S. 280, 303–05, 96 S.Ct. 2978, 2990–92, 49 L.Ed.2d 944 (1976),] to be required by the Eighth and Fourteenth Amendments .... A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

428 U.S. at 271, 96 S.Ct. at 2956.

Sections 94-5-103 and 94-5-304 of the Montana Code satisfied this requirement at the time Lana Harding was killed. Both sections provided that, upon a defendant's conviction of a capital offense, the "court shall impose [a] sentence of death ... unless there are mitigating circumstances." McKenzie does not deny that the statutes required consideration of mitigating circumstances, or that he was given a full opportunity to present evidence on this issue to the sentencing judge. Instead, he complains that the death penalty statutes themselves did not contain explicit procedural mechanisms for fulfilling this requirement.

Before passing sentence on McKenzie, the trial court ordered and considered a presentence investigation report, as required by R.C.M. § 95-2203 (1947). By statute such reports must include "the characteristics, circumstances, needs, and potentialities of the defendant; his criminal record and social history; [and] the circumstances of the offense." *Id.* § 95-2204. The Montana Supreme Court construed these provisions together to find that Montana law required trial courts to consider all mitigating circumstances contained in the presentence report or offered by the defendant. *McKenzie III*, 608 P.2d at 450.

The trial court followed this procedure, offering McKenzie a presentence hearing on mitigating facts and circumstances. State Court Findings at 5–6. McKenzie declined to offer any evidence in mitigation at or before sentencing, but he did file a post-trial Petition and Motion in Mitigation in which he raised several potentially miti-

33. McKenzie objects to the sentencing judge's consideration of non-statutory aggravating factors. The Montana Supreme Court approved this procedure, however, and it does not violate the Constitution. Reliance on non-statutory aggravating circumstances is permissible so long as the statutory sentencing scheme requires that at least one statutory aggravating circumstance be found before a death sentence may be imposed. *Barclay*, 463 U.S. at 956–58, *id.* at 966–67, 103 S.Ct. at 3428–29; *id.* at 3433–34 (Stevens, J., concurring in the judgment); *Zant*, 462 U.S. at 878–7[illegible], 103 S.Ct. at 2743–44. Montana's sentencing procedures met this requirement. *See* pp. 1539–41 *supra*.

gating factors, inter alia, his mental condition, age, upbringing, social relations and family ties. E.R. 5, H.Exh. 37, Rec. 14 at 3–4. After considering the evidence presented at trial and the presentence investigation report, the trial judge rejected defendant's arguments and found that there were no mitigating circumstances. State Court Findings at 7.

[20] McKenzie argues that, since Montana's death penalty statutes did not expressly call for a second hearing on mitigating circumstances, the Montana courts' after-the-fact reading of the law to require such an approach is constitutionally inadequate.[34] He relies on *United States v. Harper*, 729 F.2d 1216 (9th Cir.1984), which struck down the death penalty provision of the Espionage Act, 18 U.S.C. § 794 (1982), despite the district judge's willingness to supply the restrictions on sentencing discretion that were wholly absent from the statute itself. *Harper* held that judicial construction could not save the statute because *Furman*, *Gregg* and their progeny require sentencing guidelines to be formulated by the legislature at the definitional stage, not by courts at the sentencing stage. *Id.* at 1225–26.

Harper is clearly distinguishable. The Montana statutes do channel the discretion of the sentencer, first by delineating narrow subclasses of deliberate homicide and aggravated kidnaping for which the death penalty may be considered, and second by requiring consideration of mitigating circumstances before a sentence of death may be imposed. That the death penalty statutes do not themselves explicitly set out the process by which mitigating circumstances are to be considered is of no consequence. The Montana Supreme Court construed state law to require presentation and consideration of all mitigating factors, including all such evidence contained in the presentence report, and the trial judge provided McKenzie a full opportunity to present such evidence.

In *Jurek v. Texas* the Supreme Court approved a sentencing statute that did not expressly provide for full consideration of mitigating circumstances. 428 U.S. at 272-76, 96 S.Ct. at 2956–58. Instead, the Texas statutes required a post-conviction hearing where the jury determined, inter alia, whether the defendant was likely to commit violent criminal acts in the future. Because the Texas appellate courts interpreted the statute to require consideration of all mitigating circumstances at this hearing, the Supreme Court found the statutory scheme constitutional as construed by the Texas courts. If a death penalty statute that fails to provide explicitly for consideration of mitigating circumstances can be saved by judicial construction, a fortiori the Montana Supreme Court's interpretation of Montana sentencing procedures suffices to remedy any defects that may have existed on the face of the statute.[35]

3. *Sentence Review*

[21] McKenzie also argues that Montana's sentencing scheme failed to provide adequate opportunity for appellate review of death sentences, and that the review he received in the Sentence Review Division of the Montana Supreme Court (SRD) was ad hoc, standardless, improvised and fashioned solely for his case. This is not so.

All persons convicted of crimes under Montana law are entitled to direct review by the Montana Supreme Court. R.C.M. §§ 95-2401, -2404, -2405(a) (1947). The filing of a notice of appeal automatically stays execution of a sentence of death pending final resolution of the appeal. *Id.* § 95-2406(a). The state supreme court receives the full record on appeal,[36] *id.* § 95-2408, and has full power to set aside or modify the judgment or sentence of the trial court. *Id.* § 95-2426. The supreme court itself reviews all legal issues relating to the trial and the sentence imposed, while the SRD reviews the appropriateness of the sentence. *McKenzie III*, 608 P.2d at 450.

The Montana Supreme Court exhaustively considered and rejected McKenzie's claims of error on four separate occasions. On McKenzie's first appeal, the supreme court also reviewed the full record in his case to determine whether the sentence was influenced by passion, prejudice or other arbitrary factors, whether the finding of aggravating circumstances was supported by the evidence, and whether the sentence was proportionate to those imposed in similar cases. *McKenzie I*, 557 P.2d at 1034. Subsequently, after *McKenzie II* was decided, McKenzie was permitted to have his sentence reviewed by the SRD to determine whether it was appropriate in light of all the circumstances. It is this latter review that is the primary focus of McKenzie's objections.

Far from being an ad hoc, extraordinary form of review, appeal to the SRD was clearly available to McKenzie under the law of Montana: "*Every sentence* shall be subject to review in accordance with chapter 25 [establishing the SRD]." R.C.M. § 95-2211 (1947) (emphasis added) (repealed 1977); *see also id.* § 95-2502. This procedure had been invoked several hundred times by defendants before McKenzie. *See State v. Henrich*, 162 Mont. 114, 509 P.2d 288, 291 (1973). In reviewing sentences, the SRD is empowered to receive copies of presentence reports and other relevant documents, a power exercised in reviewing McKenzie's sentence. R.C.M. § 95-2503 (1947); Decision of the SRD, E.R. 33 (App.U). The Montana Supreme Court has interpreted the SRD's primary function to be "determin[ing] the appropriateness of the sentence with respect to the individual offender and particular offense." *McKenzie II*, 581 P.2d at 1229.[37] The SRD fulfilled this function in McKenzie's case. In short, McKenzie received a full and fair review of his sentence and conviction, as required by Montana law and the eighth and fourteenth amendments.[38]

Montana's death penalty sentencing scheme required a finding of aggravating circumstances before the death penalty could be considered for a particular crime, and required consideration of mitigating circumstances before it could be imposed. It provided procedures by which evidence relating to these issues could be presented to the sentencing authority, and mandated two forms of review by courts of statewide jurisdiction. The Constitution requires no more.

CONCLUSION

The district court's dismissal of McKenzie's petition for writ of habeas corpus is AFFIRMED. Parts II.A. and II.C. of the panel opinion in this case are VACATED.

FLETCHER, PREGERSON, CANBY and NORRIS, Circuit Judges, dissenting:

The thrust of the majority's opinion is (1) to stress the hideousness of the crimes; (2)

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34. At the sentencing stage, McKenzie's counsel had no doubts about whether Montana law permitted defendants an opportunity to present mitigating factors to the sentencer. McKenzie's Motion in Mitigation states: "It is generally understood that any person has the right to present matters in mitigation of sentence.... The Court herein has advised Defendant that it is receptive to, and will hear, any matter in mitigation...." E.R. 5, H. Exh. 37, Rec. 14 at 2. The motion requested that a lesser sentence be imposed based on the alleged mitigating circumstances. *Id.* at 5.

35. *Harper* correctly notes that the Supreme Court has explicitly required *statutory* aggravating circumstances in a death sentencing scheme. McKenzie apparently reads *Harper* as requiring similar explicit statutory provisions for consideration of mitigating circumstances, including detailed procedures for implementing this review. Such a reading of *Harper* would, of course, conflict with *Jurek*. We therefore decline to so interpret *Harper*. *See generally Campbell v. Kincheloe*, 829 F.2d 1453, 1464–65 & n. 7 (9th Cir.1987) (upholding constitutionality of state death penalty statute as construed by state supreme court, despite defendant's claim that judicial construction cannot cure defective statute; *Harper* distinguished on the ground that the Espionage Act "provided no guidance to the sentencing authority at all").

36. Indigent defendants are entitled to have the state provide them a transcript of the trial proceedings for purposes of appeal. R.C.M. § 95-2428 (1947).

37. There need be no express statutory description of the type of review to be undertaken by the appellate court. The Constitution requires only that such review be available, and that reviewing courts consider the appropriateness of the sentence in light of all the circumstances. *See Pulley*, 465 U.S. at 53, 104 S.Ct. 880.

38. In addition to direct appeal to the supreme court and the SRD, Montana law provides for collateral review of convictions, a procedure of which McKenzie also availed himself. *See* R.C.M. §§ 95-2601 *et seq.*; *McKenzie IV*, 640 P.2d at 371.

to stress the few instructions that standing alone would withstand constitutional muster; and (3) to weave a tortured path through the instructions that the jury *might* have followed to find a verdict untainted by the numerous instructions [1] that concededly placed an unconstitutional burden of proof on the defendant and served to confuse rather than instruct the jury.

The dissent disagrees on two principal bases. First, the instructions were so flawed that the defendant could not have had a fair trial. Harmless error analysis is simply inappropriate in such a case. The instructions in this case are so bad that even the prosecution at trial objected to their use and requested that alternatives be read in their place. They are instructions that the counsel for the State at the *en banc* oral argument admitted were in some respects the worst he had ever seen. Justice Shea of the Montana Supreme Court called the instructions "the most confusing and inconsistent set of instructions I have ever seen." *McKenzie v. Osborne*, 195 Mont. 56, 640 P.2d 368, 411 (1981) (Shea, J., dissenting). Because only a complete reading of the instructions will illustrate fully the extent to which they deviate from fair and comprehensible instructions, we append the full text to the end of this dissent. We suggest that the readers of this opinion turn first to the instructions in order to appreciate the dissent's profound disagreement with the approach the majority embraces.

Second, however, if the majority must be met on its own terms, the errors were not harmless.

1. In the twenty-five "additional" instructions read to the jury at the end of trial—and immediately before its deliberations—there were perhaps as many as *fourteen* unconstitutional presumptions.

2. In fact, "Homicide By Means of Torture" is not an actual offense in Montana. Torture is not a statutory element of any offense; rather, it is relevant only to punishment. McKenzie was actually charged with two counts of deliberate homicide. One required for a finding of guilt that he caused death "knowingly or purposefully." The other, a felony-murder provision, did not. Neither included a particular purpose requirement like the one used in the judge's torture instructions. It is unclear which count the jury used to find McKenzie guilty. The jury verdict merely states that McKenzie was guilty of deliberate homicide. A box on the verdict form stating "by means of torture" was checked. Further, the judge instructed the jury that for McKenzie to be guilty of deliberate homicide by means of torture, McKenzie did not need to have the specific intent to cause death, so long as he "knowingly or purposefully" tortured for one of the particular purposes. Instr. 23.

BACKGROUND

McKenzie was convicted of one count of deliberate homicide "by means of torture" and one count of aggravated kidnapping. Both offenses require the jury to find that the defendant acted "knowingly and purposely," [2] *and* that he acted with a particular purpose. Repeatedly, the jury instructions given at his trial directed the jury to *presume* that he had the mental states of acting "knowingly or purposefully," upon finding that the defendant performed the physical acts. As conceded by the State and the majority, because the instructions shifted the burden of proof to the defendant, they violated the due process clause of the fourteenth amendment. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

No one challenges the fact that McKenzie committed the dreadful acts. His intent was the issue at trial. His defense was mental incapacity—an inability to form the requisite criminal intent. The concepts that the jury needed to understand in order to determine whether McKenzie had the requisite criminal intent are subtle and difficult. Those trained in the law find them confusing; laypersons must find them doubly so. Insanity and diminished capacity are distinct conditions, similar but different. The defendant who asserts insanity as a defense has the burden to establish it by a *preponderance of the evidence*. If defendant's claim, however, is diminished capacity that precludes him from forming the requisite criminal intent, once he has raised a genuine issue in this regard, the *state* must prove that he had the mental capacity to form the requisite intent *beyond a reasonable doubt*. To convict

McKenzie, the jury had to find not only that, beyond a reasonable doubt, he had the general criminal intent to commit the criminal acts (that he did them "knowingly or purposefully,") but that he acted with particular purposes in mind. The jury needed to understand that general and specific intent are distinct and different, and that a defendant could possess one without the other. It needed to understand that although it could *infer* intent from the evidence, it could not *presume* it, and that although it could presume sanity, it could not presume intent. Obviously, it needed to understand the meaning of "infer" and "presume." Adequate jury instructions would have to convey these concepts in a manner that a reasonably intelligent jury could comprehend.

FUNDAMENTAL FAIRNESS

McKenzie's due process right to be convicted upon proof established beyond a reasonable doubt, and his sixth amendment right to a trial by jury have been violated. Upon the facts of this case, harmless error analysis is wholly improper.

The purpose of the requirement of proof beyond a reasonable doubt is to ensure that only the truly guilty are convicted. It reflects an age-old tradition that it is better that a guilty person go free than that an innocent one be punished. *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986). The Supreme Court has suggested that the requirement is so fundamental to our notion of fairness that the failure to instruct the jury that the state must prove its case beyond a reasonable doubt can never be harmless. *Id.* 106 S.Ct. at 3107 n. 8 (citing *Jackson v. Virginia*, 443 U.S. 307, 320 n. 14, 99 S.Ct. 2781, 2790 n. 14, 61 L.Ed.2d 560 (1979)).

Also central to our system of criminal justice is the right to a trial by jury. *See generally id.* at 3114 (Blackmun, J., dissenting). The jury's fact-finding role is protected from all interference. *Id.* Accordingly, when a trial error has affected the jury's deliberative processes, a court may apply a harmless error analysis only where the error had no effect on the outcome. *Id.* at 3108 n. 11; *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986) (constitutional errors may be harmless "in terms of their effect on the factfinding process at trial"). Thus, a directed verdict on an element of the offense in favor of the state can never be harmless. *See Connecticut v. Johnson*, 460 U.S. 73, 84, 103 S.Ct. 969, 976, 74 L.Ed.2d 823 (1983) (plurality opinion); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73, 97 S.Ct. 1349, 1355-56, 51 L.Ed.2d 642 (1977). But *Sandstrom* error, or an incorrect statement of what standard against which to judge predicate facts, *Pope v. Illinois*, — U.S. —, 107 S.Ct. 1918, 95 L.Ed.2d 439 (1987), may be harmless because such instructions do not necessarily remove the issue from the jury.[3]

Before we may apply the harmless error analysis, we must decide whether "placed in context," *Rose*, 106 S.Ct. at 3107, the instructions in the case were so egregious as to render the trial "fundamentally unfair," *Pope*, 107 S.Ct. at 1922, by preventing the jury from performing its constitutionally mandated function of determining guilt beyond a reasonable doubt. We conclude the trial was fundamentally unfair.

3. *Rose* relies on the fact that intent, unlike other elements of a crime, may only be proved through circumstantial evidence, which includes predicate acts. Otherwise properly instructed, the jury properly finds the predicate acts. Unless the defendant interposes a viable defense to the intent element, an instruction on intent is superfluous.

Pope is somewhat different. An obscenity case, *Pope* relies on the fact that the jury considered the elements of the magazine's "value," even though it judged the value by reference to the wrong community's standard. As in certain cases involving *Sandstrom* error, in *Pope*, the jury may have found predicate acts upon which the reviewing court could build in finding beyond a reasonable doubt that the jury would have found guilt under the proper standard. The same construct cannot be built in reviewing an instruction to the jury using an improper standard of review. *Jackson* thus continues as sound authority after *Pope*. *Contrast Pope*, 107 S.Ct. at 1922 n. 7.

This is not a case involving an isolated instruction tainted by *Sandstrom* error. The unconstitutional instructions were "multiple" (as the majority notes), restated in a variety of formulations, and mutually reinforcing.

The following excerpts from the jury instructions are representative of those containing *Sandstrom* error.[4]

Instruction 31 ("Mental State—Methods of Proof") describes the differences between inferences and presumptions. It states:

> The knowledge or purpose with which an act is committed being a mental state, is incapable of being proved by direct evidence, and proof thereof is permitted by indirect or circumstantial evidence, which means proof by rules of law, denominated inferences and presumptions.
>
> ....
>
> A presumption is a deduction or reasoning which the law *expressly directs* a jury make from proved fact or facts; while an inference is a deduction or reasoning which the law permits or allows the jury to draw from the fact or facts proved.
>
> Presumptions *expressly direct* you to reason from proved facts.
>
> Inferences permit you to reason from proved facts.

(Emphasis added.) To illustrate the use of presumptions, the instruction goes on to offer the following example:

> 2. *Proof by Presumption of Law* (Deductions which the law *expressly directs* to be made from particular facts):
>
> The witness heard a cry for help. He immediately looked out of a window and saw only two men; "A" holding a board and standing over the body of "B" who was unconscious on the ground and with his head bleeding. Other evidence was introduced to show that the board then held by "A" had blood on it which was the same type as "B's" blood and evidence was introduced that "B" had been struck on the head three times by the board to show that the striking was not accidental. No evidence was introduced as to a motive for "A's" striking "B" and no evidence of threats by "A" against "B" was introduced.
>
> If the jury believes the witness and the other evidence introduced they are permitted to deduce or reason that "A" struck "B" over the head with the board intentionally and for the purpose of injuring him but in addition thereto *the law presumes, that is, the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequence of his voluntary act.*
>
> Having found that "A" struck "B" over the head with a board three times, intentionally (absent any evidence that the act was in self defense by "A"), "A's" act was unlawful and *the jury is expressly directed to reason that "A" struck "B" with an unlawful intent; that is, knowingly or purposely and is further expressly directed to reason that he intended to inflict the injuries that ordinarily result from such an act.*
>
> There are other legal presumptions besides those referred to in the foregoing illustration and you will be instructed with particularity as to the use of inferences and presumptions as they may have application to each Count with which the defendant is charged.
>
> Further, unless you are otherwise instructed with regard to a particular presumption, all presumptions are rebuttable; that is, they may be controverted and overcome by other evidence.

(Emphasis added.)

The *Sandstrom* errors continue in Instructions 33 ("Method of Proof Applicable to the Offense of Deliberate Homicide"), 35 ("Method of Proof Applicable—Kidnapping"), 37 ("Methods of Proof Applicable to Sexual Intercourse Without Consent"), and 38 ("Methods of Proof Applicable to the Offenses of Aggravated Assault"). Instruction 33 states:

> (1) *If you find beyond a reasonable doubt that the defendant*, on or about January 21, 1974, in Pondera County, Montana, *voluntarily committed an illegal act* on Lana Harding, such as assaulting or injuring her, *the law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose.*
>
> This is a rebuttable presumption, which means it may be controverted and overcome by other evidence, but whether or not a presumption, once it has come into effect is overcome, is for the jury to determine.
>
> (2) *The law also presumes that a person intends the ordinary consequence of his voluntary act.*
>
> *Therefore, if you find beyond a reasonable doubt that the defendant*, on or about January 21, 1974, in Pondera County, Montana, *voluntarily and unlawfully assaulted or injured Lana Harding, and if you further find beyond a reasonable doubt that the death would result as the ordinary consequence of such an assault or injury, the law presumes that, and expressly directs you to reason therefrom that the defendant intended to cause said death regardless of whether or not he actually had such an intent or purpose.*
>
> This also is a rebuttable presumption capable of being controverted and overcome, but once it has come into effect it is for the jury to determine whether or not it has been rebutted.
>
> ....

(Emphasis added.)

Instruction 35 states:

> *If you find beyond a reasonable doubt that the defendant*, on or about January 21, 1974, in Pondera County, Montana, *without lawful authority, restrained Lana Harding*, either by secreting her in a place of isolation, or by using physical force, or by threatening to use physical force to hold her, *the law presumes that he acted therein with an unlawful intent, purpose or knowledge, and expressly directs you to so reason.*
>
> This presumption in law that an unlawful act was done with an unlawful intent is as you have heretofore been instructed, a rebuttable presumption subject to being controverted and overcome by other evidence as you may find the evidence to be.

(Emphasis added.)

Instruction 37 states:

> ....
>
> Since the offense of sexual intercourse without consent does not require that the act be done purposefully or for a particular purpose and may be proved by showing the act was knowingly done, *proof of such mental state can be made by presumption.*
>
> Therefore, since *the law presumes that an unlawful act was done with an unlawful intent* if you reason from facts proved beyond a reasonable doubt that the defendant . . . had sexual intercourse with Lana Harding who was not his wife, and without her consent, you *are expressly directed to reason therefrom, that he did so knowingly*, and you may find therefrom beyond a reasonable doubt that he committed said offense as charged.
>
> This presumption that an unlawful act was done with an unlawful intent is a rebuttable presumption subject to being controverted and overcome as you may find the evidence to be.

(Emphasis added).

Finally, Instruction 38 states:

4. A full explication of the jury instructions is beyond the scope of this dissent. For a thorough explication, see Justice Shea's thoughtful dissent in *State v. McKenzie*, 668 P.2d 229, 467-86 (1983). Also see appendix to this opinion.

....

Since the offense of aggravated assault may be committed either knowingly or purposely, the offense may be proved by showing the act was knowingly done, and *the legal presumptions that: "An unlawful act was done with an unlawful intent, and the legal presumption that a person is presumed to intend the ordinary consequences of his voluntary act," can be used to prove the mental state of knowingly.*

Therefore, if you reason from facts proved in the evidence beyond a reasonable doubt that the defendant on or about the 21st day of January, 1974, in Pondera County, Montana, unlawfully caused Lana Harding bodily injury either with or without a weapon, *the law expressly directs you to reason therefrom that he acted with unlawful intent that is purposely;* and if you further reason from facts proved beyond a reasonable doubt that the harm inflicted by him was such as ordinarily results from an act such as defendant's, *the law expressly directs you to reason that he intended the consequences of his act.*

These presumptions "that an unlawful act was done with an unlawful intent" and "A person is presumed to intend the ordinary consequences of his voluntary act", are both rebuttable presumptions, each being subject to being controverted and overcome by other evidence as you may find the evidence to be.

(Emphasis added).

The majority attempts to downplay the egregiousness of the *Sandstrom* errors by suggesting that reading all of the instructions together makes it plain the presumptions were rebuttable. *Ante* at 1529–30 n. 4. But stating that a presumption is rebuttable does not cure the error. The presumption still impermissibly shifts the burden of proof to the defendant. *See Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985).

Further, the instructions as a whole were long (forty-eight pages), convoluted, confusing, and contradictory. *See United States v. Patel*, 762 F.2d 784, 790 (9th Cir.1985) ("Instructions in a criminal case must be unmistakably clear...."). For example, McKenzie was initially charged with seven counts, each of which could result in a finding of guilt through myriad alternatives. "All told, defendant is charged with committing the crimes in at least seventeen alternative ways." *State v. McKenzie*, 608 P.2d 428, 470 (1980) (Shea, J., dissenting).[8] The jury was told that an unsound mind could be established both upon a reasonable doubt and upon a preponderance of the evidence. The examples are nearly endless. For example, Instruction 33 begins:

> The mental state accompanying the voluntary act required for the offense of deliberate homicide being either knowingly or purposely and not requiring in addition thereto that the act be committed for a particular purpose, proof of the mental state may be made by the use of either inferences or presumptions, or by the use of both inference and presumptions.

With regard to "particular purposes" the jury was first instructed that "[w]hen a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense." Instr. 7. Later the jury was instructed:

> In offenses which require proof of a particular purpose the particular purpose required may never be proved by means of legal presumptions, but must be proved by means of inferences only. In this case, the offenses of: Deliberate Homicide by Means of Torture and Aggravated Kidnapping all require proof that the defendant committed the particular act charged for a particular purpose, in addition to proof that he committed said act either knowingly or purposely.

Instr. 32. Defense counsel aptly characterized the nature of these instructions when he wrote: "The premise that the 'presumptions' played no part in [the jury's implicit findings of 'particular purposes'] ... credits the jury with a superhuman ability to parse out the confusing and conflicting instructions in this case and apply a law professor's precision to the use of the words 'presume' and 'infer.'"

The instructions were so confusing that the jury had no clear direction as to how to distinguish the different intents it must find, the burdens of proof involved, or the distinction between sanity and mental capacity. Instruction 30 advised the jury that "the defendant is presumed to have been free from any disease or defect of the mind which excludes responsibility for his conduct...." Instr. 30. It drew no distinction between insanity and diminished capacity, nor did it define the limits of "mental accountability," nor did it specify what showing by the defendant would overcome this presumption. It said simply that a defendant is presumed free from any disease or defect. Since some of the particular purposes could have been viewed by the jury as involving an intent requirement, instruction 30 could have had an impact on the particular purpose instructions. *See Francis v. Franklin*, 105 S.Ct. 1965, 1972–77 (1985) (involving a similar "sound mind" instruction).

The majority suggests that instruction 30 "[t]aken in context," refers only to the defendant's responsibility for his conduct. The "context" the majority has in mind is instruction 53, which the majority insists makes clear that the defendant's capacity to form a mental state is distinct from his legal responsibility. To say the least, this reading is strained. Instruction 53, though it speaks generally to mental accountability, says nothing specific about diminished capacity, the difference between it and insanity, or—most important—the vastly different burdens of proof attaching to each. The only elaboration of mental capacity the majority could identify appears in the last sentence of instruction 53:

> "If you find beyond a reasonable doubt that the defendant did do said acts ... you must then consider whether or not the defendant has overcome the presumption of accountability and whether or not he has created a reasonable doubt in your minds as to his mental accountability and responsibility for any of the acts you may find he committed, and whether or not he could have had the requisite mental state for the act...."

Instr. 53. The "presumption" referred to is defined in the previous paragraph of the instruction as being rebuttable "by a preponderance of the evidence." The "mental state," the jury had been told at least eight times, it could presume. The use of the conjunction "and" between the mention of accountability and mental state perhaps has persuaded the majority that the two issues could be separated in the jurors' minds. This seems doubtful.

It is hard to share the majority's certitude that instruction 53 adequately narrowed instruction 30 so that the latter applied only to responsibility and that the jury would so understand it. Instruction 53 nowhere refers to instruction 30, and nowhere clarifies the distinction between insanity and diminished capacity. The majority opinion supposes that the jury not only managed the unlikely logical link between instructions 30 and 53, but also succeeded in divining from instruction 53's Byzantine locution the oblique legal nuances that separate insanity from capacity. At the same time, the majority confidently assures us that no reasonable juror would have followed so "tortured" a chain of thought as to pay attention to one improper instruction (Instr. 36) over another (Instr. 37) immediately adjacent to it and flatly contradicted by it.

Nor were the many unconstitutional errors mitigated by a clear instruction that the jury must find every element of an offense beyond a reasonable doubt. *Rose*, 106 S.Ct. at 3107. Although such an instruction was given, it was read to the jury only at the beginning of the trial. Further,

8. This raises another constitutional problem. The jury was never specifically instructed that it must reach a unanimous decision based on a single path, rather it was told only that "all twelve jurors must agree to the decision, including the additional findings you are asked to make." Instr. 54. These instructions violated McKenzie's sixth amendment right to a unanimous verdict. *United States v. Payseno*, 782 F.2d 832, 834–37 (9th Cir.1986).

it authorized a finding of guilt upon "an abiding conviction to a moral certainty," language that has been condemned for suggesting a jury may rely on emotion rather than the facts in rendering a decision. *See United States v. Drake*, 673 F.2d 15, 21 (1st Cir.1982) (condemning language, but finding instructions as a whole to have fairly apprised the jury of reasonable doubt standard). It also did not include an explanation of "doubt" that may arise from the lack of evidence supporting the charges. Only passing references to the prosecution's burden of proof were contained in the instructions given following the trial. *See United States v. Ruppel*, 666 F.2d 261, 274 (5th Cir.) (citing *ABA Advisory Committee on the Criminal Trial, Trial by Jury* 116–18 (1968)); 8A Moore's Federal Practice ¶ 30.02 at 30–5 (2d ed. 1981) (district judge should have repeated presumption of innocence instruction at end of trial, although finding harmless error), *cert. denied*, 458 U.S. 1107, 102 S.Ct. 3487, 73 L.Ed.2d 1369 (1982). Instead, the instructions given after the evidence was presented, including the many directing the use of presumptions, tended to emphasize the defendant's guilt over his innocence.

The instructions were inflammatory. The use of presumption and inference was illustrated by examples replete with violence and blood. The judge read the information to the jury without a cautionary instruction. *See United States v. Long*, 706 F.2d 1044, 1056 (9th Cir.1983) (finding no error because jury was cautioned). He referred repeatedly to the specific allegations against the defendant. In one instruction, he chose to use the word, "kill," rather than the statutory phrase, "cause the death of," over the objection of the defendant. Instr. 34.

This is not a case like *Sandstrom*, *Francis*, *Rose* or *Pope*, each of which involved only *one* unconstitutional instruction.[6] Here, the violations were scattered throughout 48 pages of instructions. Many of the jury instructions contained more than one violation. The effect was a constant drumbeat that directed the jury to presume criminal intent.[7] The errors raise grave doubt about the jury's ability to perform a fair fact-finding function. Unlike cases containing a single tainted instruction, the instructions in this case do not provide the possibility to a reviewing court to excise and isolate the bad and find that the jury would have returned a verdict of guilty even if the jury had never heard the bad instructions. The whole process was infected. *See Chapman v. California*, 386 U.S. 18, 22–23, 87 S.Ct. 824, 827–28, 17 L.Ed.2d 705 (1967). The application of the harmless error test to a case such as this is in a very real sense unprecedented.[8]

A criminal defendant is entitled to a fair trial, not a perfect trial. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). This defendant had neither. While the court may and, indeed, should ignore minor, non-substantive errors, which may be inevitable in a long or complicated trial, "[o]ur duty to search for constitutional error with painstaking care is never more exacting than in a capital case." *Burger v. Kemp*, — U.S. —, 107 S.Ct. 3114, 3121, 97 L.Ed.2d 638 (1987). Reviewing the circumstances of Duncan McKenzie's trial, one Justice of the Montana Supreme Court called the trial a "mockery" and a "travesty." *McKenzie v. Osborne*, 640 P.2d 368, 436 (Mont.1981) (Morrison, J., dissenting). Another stated: "Never in the annals of criminal law history in this State has a defendant ever been

6. *See Sandstrom*, 442 U.S. at 513, 99 S.Ct. at 2453; *Francis*, 105 S.Ct. at 1973; *Rose*, 106 S.Ct. at 3107; *Pope*, 107 S.Ct. at 1922.

7. Justice Shea of the Montana Supreme Court concluded that unconstitutional presumptions so "permeated" the jury charge that for nearly every count of the indictment, there was a corresponding *Sandstrom*-violative instruction. *State v. McKenzie*, 608 P.2d 428, 470 (Mont. 1980) (Shea, J., dissenting).

8. Our court in a recent case, in reversing a conviction, stated "one consideration is whether as a whole [the instructions] were misleading or inadequate to guide the jury's determination." *United States v. Washington*, 819 F.2d 221, 226 (9th Cir.1987). "[A] conviction should not rest on ambiguous and equivocal jury instructions on a basic issue." *Id.*

the victim of such a consistent and wholesale denial of fundamental rights." *Id.* at 434 (Shea, J., dissenting).

Everyone agrees that the trial court's instructions to the jury were riddled with *Sandstrom* errors. These errors occurred in the context of confusing and incoherent instructions—instructions that provide a mass of information with no apparent structure. The errors touched every question asked the jury and every route it might have taken to answer them. To permit these convictions and this sentence to stand in the face of these instructions, would be a fundamental miscarriage of justice.

HARMLESS ERROR ANALYSIS

Even if harmless error analysis were appropriate in this case, we vigorously disagree with the majority's assertion that beyond a reasonable doubt the verdict was unaffected by the numerous unconstitutional instructions.

The majority approaches its harmless error analysis in a manner different from that employed in *Pope* and *Rose*. Although it acknowledges the *Pope–Rose* approach, in essence, the majority advances the argument that, *in fact*, the jury did not rely on the improper instructions. It asserts that the jury found that McKenzie committed the underlying acts with particular purposes in mind without relying on any presumptions, but rather relying on the instructions that required that they infer the particular purposes. The jury, it asserts, would then necessarily have found general intent without needing to rely on the unconstitutional presumptions. Under *Rose* and *Pope*, by contrast, we must *disregard* what the jury actually did and, instead, consider whether the jury, if it had never heard the erroneous instructions, nonetheless, beyond a reasonable doubt, would have convicted the defendant.

We feel constrained first to challenge the majority's assertion that, beyond a reasonable doubt, the jury *in fact* did not rely on the constitutionally infirm instructions in reaching its verdict. Second, using the analysis mandated by *Rose* and *Pope*, we make clear why our court, as the reviewing court, cannot determine beyond a reasonable doubt that the jury would have convicted McKenzie even if it had never heard the flawed instructions.

What the jury had to decide was whether McKenzie had the mental capacity to form the requisite criminal intent and to perform the acts with the particular purposes in mind. The fact that McKenzie committed the predicate acts was never in doubt, so the question before the jury was whether he had the various intents. The crucial evidence to be considered by the jury was the testimony of both sides' experts in psychology and psychiatry. We summarize the testimony.

Dr. Wetzler, the defense psychiatrist, testified that, based on his interviews with McKenzie, his experience, and his knowledge, he had concluded that McKenzie was incapable of forming the mental states that are elements of the crimes charged. The State produced a psychiatrist and a psychologist who found that McKenzie suffered from a personality disorder, but disagreed that he could not have formed the requisite mental states.

Dr. Wetzler heads the Spokane Psychiatric Clinic and is Chief of Staff of a psychiatric hospital in Spokane. After five years in an accredited residency program, he became Board certified in psychiatry and neurology. During World War II, Dr. Wetzler worked in a five-hundred bed neurological and psychiatric unit, in which he treated primarily soldiers returning from overseas. In addition to being a Fellow of the North Pacific Branch of the American Psychiatric Association, he was President of the Eastern Washington State District Branch of the American Psychiatric Association. Dr. Wetzler teaches forensic psychiatry at Gonzaga Law School and consults for such agencies as the Department of Labor and Industries, the Selective Service, and the Social and Health Services. He is one of the founders of the Spokane County Medical Health Center. On cross-examination, Dr. Wetzler admitted that his wife is a first cousin of McKenzie's trial counsel.

Dr. Wetzler testified that his evaluation was based on eight hours of tapes and two interviews with the defendant, one lasting six hours and the other between four and six hours. During the interviews, he listened to McKenzie's complaints and his background and observed his body language. He did not administer psychological tests or an electroencephalogram, because he did not feel they were necessary. He did not ask about the incident for which McKenzie was charged, but testified he would not change his diagnosis upon learning how the defendant allegedly acted during and immediately after it.[9]

Dr. Wetzler's diagnosis was that McKenzie had a personality trait disturbance, specifically a schizoid personality. Dr. Wetzler concluded that because of his mental defect, McKenzie was incapable of forming the requisite mental states.

Dr. Garcia, testifying for the State, is a staff psychiatrist at the Warm Springs State Hospital and is Director of a continuing treatment service clinic. After a one-year internship from 1955 to 1956, he worked in a number of hospitals, and participated in seminars and symposiums, until coming to Warm Springs in 1961. He was Clinic Director of the Warm Springs Hospital for about ten years and Director of the Mental Hygiene Clinic in Butte, Montana for two years. A member of the Montana committee for the care of the elderly, he wrote the committee's published report that was submitted to the Governor. He has also written a number of papers in psychiatry. For ten years, Dr. Garcia has worked with juveniles as a Psychiatric Consultant to the Third Judicial District Court. He acknowledged that he failed the foreign graduates medical test, which Montana has since required for licensing.

Dr. Garcia spent about one hour formally interviewing McKenzie. In addition, he observed McKenzie about once a week for five weeks, and received 24-hour reports from attendants and nurses while McKenzie was at Warm Springs. He testified that because McKenzie would not talk about the incident, he could not complete his evaluation. He also acknowledged that he could have made a better evaluation if he had pursued questions about McKenzie's sexuality, but that McKenzie had not wanted to discuss it. Dr. Garcia looked to McKenzie's background, family, verbal communication, thinking processes, ideas, and feelings in drawing his conclusion.

Dr. Garcia found that McKenzie had a passive-aggressive personality, was socially maladjusted, drank excessively and had been dependent on drugs. Like Dr. Wetzler, he found that McKenzie lacked a father figure and felt extreme hostility toward his sister.

According to Dr. Garcia, McKenzie's insight was mildly to moderately impaired, his judgment moderately impaired, and his grasp of his own life and life plan was impaired. At one point, Dr. Garcia testified that McKenzie had poor control over his energy level, particularly his aggressive drive, which would suddenly come out in a "very unacceptable manner," but later testified that he did not have an inability to repress hostile feelings. He found only minimal daydreaming, and only some oversensitivity and difficulty making friends.

Dr. Garcia disagreed that McKenzie had a schizoid personality. Rather, he found some element of antisocial behavior, which he characterized as a personality disorder rather than a mental disorder. He also disagreed with Dr. Wetzler's conclusion that McKenzie could not establish the requisite states of mind, but he acknowledged that whether McKenzie "had the ability to commit a crime" was a "matter of opinion."

9. The State asserts that Dr. Wetzler's testimony is wholly incredible because Dr. Wetzler did not consider the acts McKenzie allegedly committed during the incident with Lana Harding. We disagree. Dr. Wetzler asserted that such acts were irrelevant to his diagnosis. We find it plausible that Dr. Wetzler would have identified a mental disease or defect that simply would not vary with time and that knowledge of the predicate acts was not necessary to his diagnosis. Further, these acts are consistent with Dr. Wetzler's description of a schizoid personality. Finally, we believe that it is within the realm of the expert to determine what facts are relevant to a psychiatric diagnosis.

The State's second witness, Dr. Edward Shubat, is a clinical psychologist with the Great Falls Clinic Department of Psychology. He received his Ph.D. in 1969, having interned in 1968 and 1969 at the Palo Alto Veterans Hospital. He is a member of various psychological associations and is an accepted candidate for a diploma by the American Board of Professional Psychologists.

He interviewed McKenzie the Saturday before trial. During the interview he administered four psychological tests and took McKenzie's background. He acknowledged that psychological tests are designed to confirm or augment other diagnostic methods. He claimed that severe mental disease would show up on the tests, but Dr. Wetzler disagreed that they could necessarily reflect a schizoid type disturbance.

Dr. Shubat was able to give only a "diagnostic impression" because McKenzie did not provide him with all of the facts. Dr. Shubat found an antisocial personality. McKenzie had difficulty relating to other people, had little or no regard for them, and exhibited compulsive and self-defeating behavior. He had difficulty with anger and aggression. His "diagnostic impression" was that McKenzie could have established the requisite states of mind.

The evidence seems quite balanced—certainly not conclusive for either side. Yet the majority concludes that the jury, on the instructions given, in fact, beyond a reasonable doubt, could and did reach a guilty verdict without relying on the impermissible presumptions. It reasoned that the fact that the jury was instructed not to use a presumption in making its determination that McKenzie acted with a particular purpose indicates that the jury properly found the particular purpose element.[10] Having found that McKenzie did act with a particular purpose, the jury necessarily rejected the defense psychiatrist's, Dr. Wetzler's, testimony that McKenzie was incapable of acting knowingly or purposefully. The jury therefore, if properly instructed, would have found that McKenzie acted knowingly or purposefully.[11] This argument is seriously flawed.

To support this argument, the majority adopts the state's view that the jury must have considered the "particular purpose" element before the "knowingly and purposely" element. This, the majority and the State reason, is the only way a rational juror could have reconciled the two conflicting applicable instructions: (1) that the jury could use a presumption in determining the knowingly or purposefully element, with (2) the instruction that it could use only an inference in determining the particular purpose. However, we find no basis to assume that no rational juror could have considered the knowingly or purposefully element first. The instructions required each juror to parse and recombine numerous directives, a task, if undertaken at all, that could lead to two paths of analysis—to determine the knowingly or purposefully element first and then the particular purpose, or to reverse the order. Further, the State's argument ignores the instructions that strongly suggest that the jury consider the knowingly or purposefully element first. *See, e.g.*, Instr. 36;[12] *see generally*

10. Even this direction to the jury was flawed. Instruction 36 does instruct that proof of particular purpose is necessary in order to find aggravated kidnapping, and cautions jurors that such a purpose can never be presumed. But one "particular purpose" the jury was told it could find was facilitating the commission of sexual intercourse without consent. Aggravated assault was another such purpose. In other instructions, the trial judge directed the jury to rely on the unconstitutional presumptions in finding these underlying felonies. Instr. 37 (sexual intercourse with consent); Instr. 38 (aggravated assault).

11. The State also relied on the fact that the physical acts committed by McKenzie tended to show McKenzie's mental capacity. But these acts are equally, or, in fact, more consistent with those of a madman than with those of a sane one. The State and the majority also argued that the jury's rejection of McKenzie's insanity defense indicates that it rejected Dr. Wetzler's testimony. This argument, however, ignores the critical difference of the allocation of burden of proof in those two defenses.

12. Instruction 36 states: "The offense of Aggravated Kidnapping *in addition to* the proof required to prove the offense of kidnapping, requires that the kidnapping was committed for a particular purpose.... Therefore, *if you find* beyond a reasonable doubt that the defendant

McKenzie, 606 P.2d at 484–86 (Shea, J., dissenting). When jury instructions are inconsistent, we cannot assume that the jury chose the constitutional path. *Francis*, 105 S.Ct. at 1975–76. Because a rational juror could have considered first the knowingly and purposefully element, the unconstitutional presumption could well have tainted a juror's consideration of the particular purpose element, thereby impermissibly providing a building block from which to use the inference. Having found—although improperly—that McKenzie acted knowingly or purposefully, it is but a small step to choose among possible objectives McKenzie's alleged particular purpose.

Even if we were to agree that the jury, through an uncanny ability to make sense of these instructions, determined first McKenzie's particular purpose, it cannot be determined beyond a reasonable doubt that the jury rejected Dr. Wetzler's testimony concerning diminished capacity even though finding a particular purpose. Although twice referring to the particular purpose element as a mental state, *see* Instrs. 34, 36, the trial judge nowhere defined the element as an intent requirement nor explained what is necessary to reach a finding that the element was present.[12] Further, one of the particular purposes, "to satisfy some [ ] untoward propensity of the assailant" does not invite consideration of Dr. Wetzler's testimony at all.

Some of the particular purposes arguably could have been viewed by the jury as involving an intent requirement. Nonetheless, these instructions are also tainted by the unconstitutional presumption. Instruction 30 directs the jury to presume that McKenzie is of sound mind. The trial court directed the jury to read all of the instructions together with all of the other instructions. Implicitly, then, instruction 30 must have had an impact on the particular purpose instructions or, at least, there is a high likelihood that it did. *See Francis*, 105 S.Ct. at 1972–77 (involving a similar "sound mind" instruction). In addition, several of the particular purposes permit consideration of the underlying felonies. Elsewhere, the trial judge directed the jury to use the unconstitutional presumptions in finding these underlying felonies. *See* Instr. 27 (sexual intercourse without consent); Instr. 28 (assault). The majority's answer is that the trial judge directed the jury "never" to use a presumption in determining a particular purpose. In actuality, that instruction is inconsistent with the other instructions and only adds to the confusion. It is not clear beyond a reasonable doubt that it was the only instruction a rational juror would follow. *Francis*, 105 S.Ct. at 1975–76. We simply cannot agree with the majority that the jury, in fact, beyond a reasonable doubt, did not rely on the unconstitutional presumptions.

Nor are we persuaded by applying the *Rose–Pope* analysis that "the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same." *Pope*, 107 S.Ct. at 1922 n. 6. Looking at the record as a whole, we must determine whether " 'the evidence was so dispositive on intent that ... beyond a reasonable doubt ... the jury would have found it unnecessary to rely on the presumption.' " *Rose*, 106 S.Ct. at 3109 (quoting *Connecticut v. Johnson*, 460 U.S. 73, 97 & n. 5, 103 S.Ct. 969, 983 & n. 5, 74 L.Ed.2d 823 (1983) (Powell, J., dissenting)).

We are confronted essentially with the conflicting evidence of the State's and the defendant's expert psychiatrists as to the capacity of the defendant to form criminal intent. It appears fairly evenly balanced. Our role is not to judge the credibility of the witnesses, but rather to determine whether any juror could have had a reasonable doubt as to the defendant's capacity to form a criminal intent.

Because of the conflicting testimony of qualified experts, directed to the critical issue of mental capacity, who can say beyond a reasonable doubt how the jury, unburdened from the wrong and confusing instructions, would have decided whether McKenzie had the requisite intents? We simply *can't know* and certainly we cannot know beyond a reasonable doubt. Even if we were to accept that the jury's findings of "particular purposes" were properly made, the "particular purposes" are a strange assortment of goals, not all of which are clearly matters of intent. The finding of "particular purposes" does not make it clear beyond a reasonable doubt that the jury, if properly instructed, would have found an intent to kill or kidnap. The capacity to have a particular purpose does not necessarily encompass the capacity to entertain a rather different kind of intent.

Nor can we assume that the jury, in finding that McKenzie entertained a particular purpose, necessarily rejected all of Dr. Wetzler's testimony. The jury was not required to accept or reject that testimony in its entirety; it could have accepted portions of it and drawn its own conclusions regarding McKenzie's ability to entertain particular kinds of intent.

When intent is at issue, a *Sandstrom* error ordinarily cannot be harmless. *See Bowen v. Kemp*, 832 F.2d 646 (11th Cir. 1987) (en banc). The evidence of intent must be overwhelming to make the error harmless. *Id.* at 661. The evidence of McKenzie's capacity to form the requisite intents was far from overwhelming.

CONCLUSION

Duncan McKenzie was accused of heinous and violent crimes. But the nature of the crimes does not excuse the State of Montana from affording him a fair trial. The errors in instructions were many and monstrous, intertwined and confusing. They obscured the only issue: whether McKenzie had the capacity to form the requisite criminal intent. The effect was to deny Duncan McKenzie a fair trial.[14] The district court's decision dismissing the writ of habeas corpus should be reversed.

APPENDIX TO DISSENT

The State of Montana, Plaintiff,

v.

Duncan Peder McKenzie, Jr., Defendant.

Criminal Case No. 6593A

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

Filed Feb. 1, 1975

PRELIMINARY INSTRUCTIONS

LADIES AND GENTLEMEN OF THE JURY:

The following are preliminary written instructions of the law in this case, and at the conclusion of the trial additional instructions may be necessary, and, if so, they will be given to you. These instructions are given to you at this time to assist you throughout the trial of the case.

1. It is the duty of the Judge to instruct the jury on the law applicable to this case, and it is your duty as jurors to follow the law as I shall state it to you.

2. The function of the jury is to try the issues of fact that are presented by the allegations in the information filed in this Court and the defendant's pleas of "Not Guilty". This duty you should perform uninfluenced by passion or prejudice. You must not suffer yourselves to be biased against a defendant because of the fact that he has been arrested for these offenses, or because an information has been filed against him, or because he has been brought before the Court to stand trial. None of these facts is evidence of his guilt, and you are not permitted to infer or to speculate from any or all of them that he is more likely to be guilty than innocent.

... did kidnap Lana Harding, before he can be found guilty of the offense of aggravated kidnapping ..., *you must further find* beyond a reasonable doubt that he acted while having at least one of the particular purposes charged." (Emphasis added.) *See also* Instr. 34.

In addition, instructions 29 and 32 require that the particular purpose be proved "*in addition to proof* that he committed said act either knowingly or purposefully." (Emphasis added.)

12. We do not think that Instr. 10 clarified for the jury the meaning of the particular purpose element.

14. We do not reach the other issues addressed by the majority.

APPENDIX—Continued

3. By no remark made by the Court during the trial nor by these instructions does the Court express any opinion as to the facts in this case or what verdict you should return.

4. You should take the law in this case from the Court's instructions alone. You should not give any weight to statements of counsel or of anyone else as to what the law is, nor should you allow yourselves to decide this case contrary to these instructions, even though you might believe that the law ought to be otherwise. Counsel, however, are privileged to comment and argue to the jury upon the law as given in these instructions. If, in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you; neither are you to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all of the instructions as a whole, and are to regard each in the light of all the others. The order in which the instructions are given has no significance as to their relative importance.

5. You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the State and the defendant have a right to demand, and they do demand and expect that you will conscientiously and dispassionately consider and weigh the evidence and apply the law to the case and that you will reach a just verdict.

6. STATEMENT OF THE CASE

The defendant, DUNCAN PEDER McKENZIE, JR., is accused in the information filed against him of the following offenses: Deliberate Homicide—two counts; Aggravated Kidnapping—two counts; Sexual Intercourse Without Consent—one count; Aggravated Assault—two counts. The offenses are charged as follows:

"That Duncan Peder McKenzie, Jr., late of the County of Ponders, on or about the 21st day of January, A.D. 1974 at the County of Ponders in the State of Montana, committed the crimes charged in the following counts, all at locations in Ponders County Montana."

COUNT I: That DUNCAN PEDER McKENZIE, JR., committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being, in violation of Section 94-5-101 and Section 94-5-102 R.C.M. 1947.

COUNT II: That DUNCAN PEDER McKENZIE, JR., committed the crime of DELIBERATE HOMICIDE, a felony, by purposely or knowingly causing the death of LANA HARDING, a human being, while the said DUNCAN PEDER McKENZIE, JR., was engaged in the commission of, or in an attempt to commit, or flight after committing or attempting to commit:

1. SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with the said LANA HARDING, a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, JR., being a male person; or

2. AGGRAVATED ASSAULT, a felony involving the use or threat of physical force or violence against the said LANA HARDING, by purposely or knowingly causing:

(a) Serious bodily injury to the said LANA HARDING; or

(b) bodily injury to the said LANA HARDING with a weapon, namely:

(1) a rope, by placing said rope around the neck of the said LANA HARDING; or

(2) a heavy object, by striking the said LANA HARDING upon her head with said heavy object; or

that the said DUNCAN PEDER McKENZIE, JR., committed the crime of DELIBERATE HOMICIDE, a felony, as above alleged, by purposely, or knowingly causing the death of the said LANA HARDING:

1. by mean of torture; or

2. by lying in wait or ambush.

APPENDIX—Continued

in violation of Section 94-5-101, 94-5-102, 94-5-503 and 94-5-202, R.C.M. 1947.

COUNT 2: That DUNCAN PEDER McKENZIE, JR., committed the crime of AGGRAVATED KIDNAPPING, a felony, by knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force with the purpose of facilitating the commission, or flight thereafter, of the felony:

1. SEXUAL INTERCOURSE WITHOUT CONSENT, by knowingly having sexual intercourse with the said LANA HARDING, a female not his spouse, without consent, the said DUNCAN PEDER McKENZIE, JR., being a male person; or

2. AGGRAVATED ASSAULT, by purposely or knowingly causing:

(a) serious bodily injury to the said LANA HARDING; or

(b) bodily injury to the said LANA HARDING with a weapon namely:

1. a rope, by placing said rope around the neck of the said LANA HARDING; or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Sections 94-5-303, 94-5-503 and 94-5-202, R.C.M.1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 4: That DUNCAN PEDER McKENZIE, JR., committed the crime of AGGRAVATED KIDNAPPING, a felony, knowingly or purposely and without lawful authority restraining LANA HARDING by either secreting or holding the said LANA HARDING in a place of isolation, or by using or threatening to use physical force, with the purpose of inflicting bodily injury on the said LANA HARDING or terrorizing the said LANA HARDING, in violation of Section 94-5-303, R.C.M. 1947, the said LANA HARDING having died as a result of said criminal conduct.

COUNT 5: That DUNCAN PEDER McKENZIE, JR., a male person, committed the crime of SEXUAL INTERCOURSE WITHOUT CONSENT, a felony, by knowingly having sexual intercourse with LANA HARDING, a female not his spouse, without consent, in violation of Section 94-5-503, R.C.M. 1947.

COUNT 6: That DUNCAN PEDER McKENZIE, JR., committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing serious bodily injury to LANA HARDING, in violation of Section 94-5-202, R.C.M.1947.

COUNT 7: That DUNCAN PEDER McKENZIE, JR., committed the crime of AGGRAVATED ASSAULT, a felony, by purposely or knowingly causing bodily injury to LANA HARDING with a weapon, namely

1. a rope, by placing said rope around the neck of the said LANA HARDING; or

2. a heavy object, by striking the said LANA HARDING upon her head with said heavy object;

in violation of Section 94-5-202, R.C.M.

Although the Defendant is charged with two counts in each of the offenses of Deliberate Homicide, Aggravated Kidnapping and Aggravated Assault, only one offense of Deliberate Homicide and one offense of Aggravated Kidnapping and one offense of Aggravated Assault are involved in this case. Leave was granted the State of Montana to charge in this manner, and to also charge the offense of Sexual Intercourse Without Consent, in order to meet the problems in proof that arise when an offense or offenses can be committed in different ways, or by different means, or for different purposes.

The Defendant can be convicted or acquitted on any or all of said offenses as you may find the allegations in each of said counts proved or not proved, but in no event may be sentenced for more than one offense of Deliberate Homicide and more

APPENDIX—Continued

than one offense of Aggravated Kidnapping and more than one offense of Aggravated Assault even though you may find both of the counts with which he is charged in each of said offenses to have been proved beyond a reasonable doubt.

Sentencing, if any, will depend upon the verdict or verdicts which you may return, and under Montana law the matter of sentencing is vested solely in the Court so you are not to concern yourselves therewith.

In arriving at your verdict or verdicts in this case, the subject of penalties or possible punishment is not to be discussed or considered by you and must not in any way be allowed to affect your decisions as to the innocence or guilt of the defendant of the offenses charged.

To each of the seven counts contained in the Information the Court, under the law of this State, ordered a plea of "Not Guilty" to be entered on behalf of the defendant, when under his legal right he stood mute and refused to plead to the counts contained in the Information. Under such pleas of "Not Guilty" every material allegation contained in each of said seven counts is denied.

In order to convict the defendant of the offense charged in any of said counts all of the material allegations contained in that particular count must be proved beyond a reasonable doubt. All of the allegations contained in each Count are material to the charge contained in that count.

7. PRESUMPTION OF INNOCENCE—DEFINITION OF REASONABLE DOUBT

You are instructed that a defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. The effect of this presumption places upon the State the burden of proving the defendant guilty beyond a reasonable doubt.

Reasonable doubt is defined as follows:

It is not a mere possible doubt, because everything relating to human affairs and depending upon evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

8. MAY NOT CONVICT ON CONJECTURE OR SURMISE

A person may not be convicted on possibilities or on mere conjecture or surmises, however shrewd, but only on evidence establishing his guilt beyond a reasonable doubt; that is, on evidence which establishes an abiding conviction to a moral certainty of the truth of the charge.

9. EXCLUDING ALL POSSIBILITY OF ERROR AND PROOF TO ABSOLUTE CERTAINTY NOT REQUIRED

You are instructed that the law does not require demonstration or that degree of proof which, excluding all possibility of error, produces absolute certainty, for such degree of proof is rarely possible. That degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it; that is, to a moral certainty of the truth of the charge, no more and no less.

10. PURPOSELY DEFINED:

A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

APPENDIX—Continued

11. KNOWINGLY DEFINED:

A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

12. INTENT DEFINED:

Intent is a state of the mind importing conscious purpose, aim or decision.

13. FELONY DEFINED:

"Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding one (1) year.

14. FORCIBLE FELONY DEFINED:

"Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

15. THREAT DEFINED:

"Threat means a menace, however communicated to:

(a) inflict physical harm on the person threatened or any other person or on property; or

(b) subject any person to physical confinement or restraint; or

(c) commit any criminal offense.

16. ACTS DEFINED:

"Acts" has its usual and ordinary grammatical meaning and includes any bodily movement, any form of communication, and where relevant, includes a failure or omission to take action.

17. VOLUNTARY ACT DEFINED:

A "voluntary act" is any act that is the product of the effort or determination of the actor, either conscious or habitual.

18. BODILY INJURY DEFINED:

"Bodily injury" means physical pain, illness or any impairment of physical condition and includes mental illness or impairment.

19. SERIOUS BODILY INJURY DEFINED:

"Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function or process of any bodily member or organ and includes serious mental illness or impairment.

20. SEXUAL INTERCOURSE DEFINED:

"Sexual intercourse" means penetration of the vulva, anus or mouth of one person by the penis of another person, or penetration of the vulva or anus of one person by any body member of another person or penetration of the vulva, or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.

21. HUMAN BEING DEFINED:

"Human being" means a person who has been born and is alive.

22. DELIBERATE HOMICIDE DEFINED:

In this case, insofar as we are concerned with the offense of deliberate homicide, you are instructed:

Deliberate homicide is one kind of criminal homicide. Homicide is deliberate homicide if:

(a) it is committed either purposely or knowingly;

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit kidnapping, or any other felony which involves

APPENDIX—Continued

the use or threat of physical force or violence against the individual.

Proof that the defendant acted both purposely and knowingly is not required. Proof of either of said mental states is sufficient.

23. DELIBERATE HOMICIDE BY MEANS OF TORTURE DEFINED:

Deliberate Homicide by Means of Torture insofar as we are concerned with the definition thereof in this case is:

Whoever purposely assaults another physically for the purpose of inflicting cruel suffering upon the person so assaulted for the particular purpose of enabling the assailant to either:

(a) extort anything from such person;

(b) or to persuade such person against his or her will, or

(c) to satisfy some other untoward propensity of the assailant,

and in so doing the assailant causes the death of the person he assails, in the law is guilty of the offense of Deliberate Homicide by Means of Torture, whether or not it was the purpose or intention of the assailant to cause such death.

"Untoward Propensity" means any perverse, wrong, bad or corrupt inclination or tendency.

24. DELIBERATE HOMICIDE BY MEANS OF LYING IN WAIT OR AMBUSH DEFINED:

Deliberate Homicide by means of lying in Wait or Ambush, insofar as we are concerned with the definition thereof in this case is:

Whoever conceals himself, and watches and waits for another with the particular purpose of taking such person unawares, and killing him, and he does kill him is Guilty of Deliberate Homicide by means of lying in wait or ambush.

25. KIDNAPPING AND AGGRAVATED KIDNAPPING DEFINED:

Insofar as we are concerned with the offense of Kidnapping in this case you are instructed:

Kidnapping:

A person commits the offense of kidnapping if he either knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by either using or threatening to use physical force to hold said person.

Aggravated Kidnapping:

A person commits the offense of aggravated kidnapping if he either knowingly or purposely restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force to hold said person for any of the following particular purposes:

(a) to facilitate the commission of any felony,

(b) to inflict bodily injury on the victim, or

(c) to terrorize the victim.

26. SEXUAL INTERCOURSE WITHOUT CONSENT DEFINED:

A male person who knowingly has sexual intercourse without consent, with a female, not his spouse, commits the offense of sexual intercourse without consent.

"Without Consent" means the victim is compelled to submit by force, or by threat of imminent death, bodily injury or kidnapping, or that the victim is incapable of consent because she is physically helpless.

"Physically helpless" means that a person is unconscious or otherwise physically unable to communicate an unwillingness to act.

27. AGGRAVATED ASSAULT DEFINED:

A person commits the offense of Aggravated Assault if he either purposely or knowingly causes either:

(a) Serious bodily injury to another, or

(b) Bodily injury to another with a weapon.

APPENDIX—Continued

"Weapon" means any instrument or article, or substance which, regardless of its primary function, is really capable of being used to produce death or serious bodily injury.

28. COURT ADMONITION TO JURY:

It is your duty not to converse among yourselves or with anyone else, or to suffer yourselves to be addressed by any person on any subject connected with this trial, or to form or express any opinion thereon until the case is finally submitted to you. If anyone should attempt to talk to you about the case, you will advise them that you have been selected as a juror in the case and that you are not permitted to talk about it. If [illegible] continue to talk to you, it will be your duty to immediately report the same to the Court.

The State of Montana, Plaintiff,

vs.

Duncan Peder McKenzie, Jr., Defendant.

Criminal Case No. 6593-A

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

Filed Feb. 1, 1975

ADDITIONAL INSTRUCTIONS

LADIES AND GENTLEMEN OF THE JURY:

29. REQUIREMENT OF VOLUNTARY ACT WITH A MENTAL STATE.

A person to be guilty of any of the offenses charged in any of the seven counts charged in the Information must have committed the act or acts charged voluntarily, while having with regard to each element contained in the law defining the offense one of the mental states contained in the said definition.

I.

The offense of Deliberate Homicide requires that the voluntary act (the killing) have been committed by the defendant either knowingly or purposely or that it was committed in the commission of a forcible felony.

II.

The offense of Deliberate Homicide by Means of Torture requires that the voluntary act (the physical infliction of cruel suffering) be done purposely and in addition thereto that it was done for the particular purpose of enabling the assailant either:

(a) to extort something from the person assailed; or,

(b) to persuade the assailed against his or her will; or

(c) to satisfy some other untoward propensity of the assailant.

III. [Omitted by Court]

IV.

The Offense of Kidnapping requires that the voluntary act (the secreting or holding of a victim in a place of isolation without lawful authority, or the holding of said person by physical force or threats thereof) be done either knowingly or purposely.

V.

The Offense of Aggravated Kidnapping requires that the voluntary act (the secreting or holding the victim without lawful authority in a place of isolation, or the holding of said person by physical force or threats thereof), be done either knowingly or purposely, and in addition thereto that it be done for one of the following particular purposes: either

(a) to facilitate the commission of any felony (in this case sexual intercourse without consent of the victim, or an aggravated assault upon the victim), or

(b) to inflict bodily injury on the victim, or

(c) to terrorize the victim.

APPENDIX—Continued

VI.

The Offense of Sexual Intercourse Without Consent requires that the voluntary act (sexual intercourse without consent) be done knowingly.

VII.

The Offense of Aggravated Assault requires that the voluntary act (the infliction of serious bodily injury either with or without a weapon, or the infliction of bodily injury with a weapon) be done either knowingly or purposely.

30. MENTAL STATE—KNOWLEDGE OR PURPOSE—HOW MANIFESTED

The knowledge or purpose with which an act is done is manifested by the circumstance connected with the offense and the sound mind of the accused. All persons are of sound mind who are not afflicted with a disease or defect of the mind which excludes responsibility for their conduct.

Upon the trial of the issues raised by the pleas of "Not Guilty" to the charges made in the Information, the defendant is presumed to have been free from any disease or defect of the mind which excludes responsibility for his conduct at the time the offenses are alleged to have been committed and to be sane now.

31. MENTAL STATE—METHODS OF PROOF

The knowledge or purpose with which an act is committed being a mental state, is incapable of being proved by direct evidence, and proof thereof is permitted by indirect or circumstantial evidence, which means proof by rules of law, denominated inferences and presumptions.

In considering the question of mental state (either knowledge or purpose) it is necessary that you understand the difference between direct and indirect or circumstantial evidence and the legal distinction between inferences and presumptions, so that you use and apply the correct rule in evaluating the evidence, and in your determination of the questions of knowledge or purpose.

Direct evidence is evidence obtained through the use of any of the five senses, and which proves the fact in question without the use of either inferences or presumptions.

Direct evidence, if found to be true, is conclusive proof of the facts testified to.

Indirect evidence, also known as circumstantial evidence, does not prove the fact in question directly. Rather the fact in question is deduced, that is reasoned, from a proved fact, or facts. Indirect evidence is of two kinds; namely presumptions and inferences.

A presumption is a deduction or reasoning which the law expressly directs a jury make from proved fact or facts; while an inference is a deduction or reasoning which the law permits or allows the jury to draw from the fact or facts proved.

Presumptions expressly direct you to reason from proved facts.

Inferences permit you to reason from proved facts.

It is not necessary that facts be proved by direct evidence. They may be proved also by indirect evidence or by a combination of both direct and indirect evidence. Both direct evidence and indirect evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

By way of example only, and to illustrate the difference between direct and indirect evidence and the difference between inferences and presumptions of law, you are instructed:

I.

Proof by Direct Evidence (Testimony obtained through the use of any of the five senses, and which prove the fact in question without the use of either inferences or presumptions and which, if found true, conclusively prove such fact):

The witness actually saw "A" pick up a board and hit "B" over the head with it knocking "B" to the ground with a bleeding head. He testified only as to what he saw: "A" picking up the board, hitting "B" over the head with it and "B" being knocked to the ground with a bleeding head. If the jury believes the witness it conclusively proves without the use of inference or presumption only that "A" picked up a board and struck "B" over the head with it and "B" was injured thereby. "A's" mental state—did he hit "B" over the head knowingly and purposely to injure "B"—has to be reasoned from the fact "A" picked up the board and from the manner and way he used it in striking "B", and from any other facts and circumstances proved in connection with the matter, that is proved by indirect or circumstantial evidence (inference or presumption).

APPENDIX—Continued

II.

Proof by Indirect or Circumstantial Evidence.

(Deduction or reasoning which the jury makes from facts proved):

1. *Proof by Inference* (Deduction which the reason of the jury makes from facts proved without an express direction of the law to that effect).

The witness heard a cry for help, he immediately looked out of the window and saw only two men: "A" holding a board, was standing over the body of "B" who was unconscious on the ground bleeding from a wound in his head. He did not see "A" strike "B" and testified only as to what he saw and heard. Other evidence was introduced to show that the board then held by "A" had blood on it which was the same type as "B's" blood, and that "A" had a motive for striking "B" and had made threats against "B".

If the jury believes the witness and the other evidence which was introduced they are permitted to deduce; that is, reason therefrom that "A" struck "B" with the board and that he did so intentionally; that is knowingly or purposely.

2. *Proof by Presumption of Law* (Deductions which the law expressly directs to be made from particular facts):

The witness heard a cry for help. He immediately looked out of a window and saw only two men, "A" holding a board and standing over the body of "B" who was unconscious on the ground and with his head bleeding. Other evidence was introduced to show that the board then held by "A" had blood on it which was the same type as "B's" blood and evidence was introduced that "B" had been struck on the head three times by the board to show that the striking was not accidental. No evidence was introduced as to a motive for "A's" striking "B" and no evidence of threats by "A" against "B" was introduced.

If the jury believes the witness and the other evidence introduced they are permitted to deduce or reason that "A" struck "B" over the head with the board intentionally and for the purpose of injuring him but in addition thereto the law presumes, that is, the law expressly directs the jury to reason: That an unlawful act was done with an unlawful intent and also that a person is presumed to intend the ordinary consequences of his voluntary act.

Having found that "A" struck "B" over the head with a board three times, intentionally (absent any evidence that the act was in self defense by "A"), "A's" act was unlawful and the jury is expressly directed to reason that "A" struck "B" with an unlawful intent; that is, knowingly or purposely and is further expressly directed to reason that he intended to inflict the injuries that ordinarily result from such an act.

There are other legal presumptions besides those referred to in the foregoing illustration and you will be instructed with particularity as to the use of inferences and presumptions as they may have application to each Count with which the defendant is charged.

Further, unless you are otherwise instructed with regard to a particular presumption, all presumptions are rebuttable; that is, they may be controverted and overcome by other evidence.

32. PARTICULAR PURPOSE NEVER TO BE PRESUMED

In offenses which require proof of a particular purpose the particular purpose re-

APPENDIX—Continued

quired may never be proved by means of legal presumptions, but must be proved by means of inferences only. In this case the offenses of: Deliberate Homicide by Means of Torture and Aggravated Kidnapping all require proof that the defendant committed the particular act charged for a particular purpose, in addition to proof that he committed said act either knowingly or purposely.

33. METHOD OF PROOF APPLICABLE TO THE OFFENSE OF DELIBERATE HOMICIDE

The mental state accompanying the voluntary act required for the offense of deliberate homicide being either knowingly or purposely and not requiring in addition thereto that the act be committed for a particular purpose, proof of the mental state may be made by the use of either inferences or presumptions, or by the use of both inferences and presumptions.

I. *Proof of Mental State by Inference*

If you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, in the commission of a voluntary act, caused the death of Lana Harding, you are permitted from that fact alone to deduce or reason that he did so either knowingly or purposely, if no circumstances of mitigation, excuse or justification appear in the evidence.

You will be instructed on mitigation, excuse and justification if such instructions are needed.

In addition to the fact of death being voluntarily caused by the accused, you may, and are instructed to also consider all of the facts and circumstances connected with said death, that have been proved in the evidence in determining whether or not the defendant acted either knowingly or purposely.

II. *Proof of Mental State by Presumptions*

(1) If you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, voluntarily committed an illegal act on Lana Harding, such as assaulting or injuring her, the law presumes that an unlawful act was done with an unlawful intent; that is, the law expressly directs you to reason from such unlawful act that the defendant acted with an unlawful intent, or purpose.

This is a rebuttable presumption, which means it may be controverted and overcome by other evidence, but whether or not a presumption, once it has come into effect is overcome, is for the jury to determine.

(2) The law also presumes that a person intends the ordinary consequence of his voluntary act.

Therefore, if you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, voluntarily and unlawfully assaulted or injured Lana Harding, and if you further find beyond a reasonable doubt that the death would result as the ordinary consequence of such an assault or injury, the law presumes that, and expressly directs you to reason therefrom that the defendant intended to cause said death regardless of whether or not he actually had such an intent or purpose.

This also is a rebuttable presumption capable of being controverted and overcome, but once it has come into effect it is for the jury to determine whether or not it has been rebutted.

III. *Proof of Deliberate Homicide by Commission of a Forcible Felony*

Under subdivision (b) in the definition of deliberate homicide you have been instructed a homicide is deliberate homicide if it is committed while the offender is engaged in the commission of, or an attempt to commit sexual intercourse without consent, kidnapping or any other felony which involves the threat of any physical force or violence against any individual.

Sexual Intercourse without consent, Kidnapping and Aggravated Kidnapping and Aggravated Assault have been defined for you. All of these offenses are felonies which involve the threat of physical force or violence against an individual.

APPENDIX—Continued

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, while engaged in —the offense of Sexual intercourse without consent, or in the offense of kidnapping, or in the offense of aggravated kidnapping, or in the offense of aggravated assault,— caused the death of Lana Harding, the law has declared that he has committed the offense of deliberate homicide, regardless of whether or not it was his purpose or intent to cause such death.

34. METHODS OF PROOF APPLICABLE TO DELIBERATE HOMICIDE BY MEANS OF TORTURE

The mental state of purposely assaulting another physically to inflict cruel suffering upon that person for a particular purpose cannot be proved by using the legal presumptions you have been directed to use in the proof of deliberate homicide, and must be proved by the use of inferences alone.

Therefore, if you find from the evidence beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, purposely assaulted Lana Harding physically and inflicted cruel suffering upon her and in so doing caused her death, you are permitted to infer, that is, deduce or reason from the facts and circumstances which are proved in connection therewith, that he did so for one or more of the particular purposes charged; either,

(a) to extort something from her, or

(b) to persuade her to do something against her will, or

(c) to satisfy some other untoward propensity of the defendant.

And if you find one or more of said particular purposes to have been proved beyond a reasonable doubt and that the defendant killed her while purposely so inflicting cruel suffering upon her, he has committed the offense of Deliberate Homicide by means of Torture, whether it was or was not his purpose or intention to kill her.

35. METHOD OF PROOF APPLICABLE—KIDNAPPING

The offense of kidnapping is a lesser offense included in the charges of Aggravated Kidnapping made in Counts 3 and 4 of the Information.

The charge of kidnapping requires that the defendant need only to have either knowingly or purposely, without unlawful authority, restrained Lana Harding by secreting or holding her in a place of isolation, or by using or threatening to use physical force to hold her.

It does not require, as does the offense of Aggravated Kidnapping, that the defendant have had in addition to such unlawful restraining a particular purpose in mind, such as the purpose to commit sexual intercourse without her consent, or to inflict bodily injury on her, or to terrorize her.

Therefore, the mental state of either knowingly or purposely restraining Lana Harding may be proved by way of inferences or presumptions of law or by the use of both inferences and presumptions of law.

I. *Proof by Inference*

If you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, without lawful authority, voluntarily restrained Lana Harding, either by secreting her in a place of isolation, or by using physical force, or by threatening to use physical force to hold her, you are permitted to reason therefrom and from all other facts and circumstances connected therewith that he did so either knowingly or purposely.

II. *Proof by Presumption*

If you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, without lawful authority, restrained Lana Harding, either by secreting her in a place of isolation, or by using physical force, or by threatening to use physical force to hold her, the law presumes that he acted therein with an unlawful intent, purpose or knowl-

APPENDIX—Continued

edge, and expressly directs you to so reason.

This presumption in law that an unlawful act was done with an unlawful intent is as you have heretofore been instructed, a rebuttable presumption subject to being controverted and overcome by other evidence as you may find the evidence to be.

36. METHOD OF PROOF—AGGRAVATED KIDNAPPING

The offense of Aggravated Kidnapping, in addition to the proof required to prove the offense of kidnapping, requires proof that the kidnapping was committed for a particular purpose.

In this case Count 4 requires proof that the Kidnapping was for a particular purpose either to inflict bodily injury on Lana Harding, or to terrorize her and Count 3 requires that the kidnapping have been for the particular purpose of facilitating the commission of a felony: either sexual intercourse with Lana Harding without her consent, or to commit an Aggravated Assault on her.

Therefore, if you find beyond a reasonable doubt that the defendant, on or about January 21, 1974, in Pondera County, Montana, did kidnap Lana Harding, before he can be found guilty of the offense of aggravated kidnapping as charged in the Information, you must further find beyond a reasonable doubt that he acted while having at least one of the particular purposes charged.

Since a particular purpose may never be presumed in law, the mental state of either knowingly or purposely secreting or holding for a particular purpose must be proved by inference only without the use of any presumptions of law.

This means if you find beyond a reasonable doubt that the defendant did kidnap Lana Harding, you are permitted to deduce or reason from any and all facts and circumstances proved in connection therewith that he did so with one or more of the particular purposes charged in Counts 3 and 4, and to find beyond a reasonable doubt that he committed the offense as charged.

37. METHODS OF PROOF APPLICABLE TO SEXUAL INTERCOURSE WITHOUT CONSENT

I. *Proof by Inference*

You are permitted to deduce, that is reason, from facts proved beyond a reasonable doubt: That the defendant on or about the 21st day of January, 1974, in Pondera County, Montana, without the consent of Lana Harding, who was not his wife, knowingly had sexual intercourse with her, and to find beyond a reasonable doubt, that he committed the offense of sexual intercourse without consent as charged.

II. *Proof by Presumption*

Since the offense of sexual intercourse without consent does not require that the act be done purposely or for a particular purpose and may be proved by showing the act was knowingly done, proof of such mental state can be made by presumption.

Therefore, since the law presumes that an unlawful act was done with an unlawful intent if you reason from facts proved beyond a reasonable doubt that the defendant on or about January 21st, 1974, in Pondera County, Montana, had sexual intercourse with Lana Harding who was not his wife, and without her consent, you are expressly directed to reason therefrom, that he did so knowingly, and you may find therefrom beyond a reasonable doubt that he committed said offense as charged.

This presumption that an unlawful act was done with an unlawful intent is a rebuttable presumption subject to being controverted and overcome as you may find the evidence to be.

38. METHODS OF PROOF APPLICABLE TO THE OFFENSE OF AGGRAVATED ASSAULT

I. *Proof by Inference*

You are permitted to reason from facts proved beyond a reasonable doubt

APPENDIX—Continued

(a) That the defendant on or about the 21st day of January, 1974, in Pondera County, Montana, either knowingly or purposely caused Lana Harding serious bodily harm (as distinguished from just bodily harm) without the use of a weapon, and/or

(b) That on or about the 21st day of January, 1974, in Pondera County, Montana, the defendant either knowingly or purposely with a weapon, inflicted bodily harm (as distinguished from serious bodily harm) on Lana Harding, and to find beyond a reasonable doubt that the defendant committed the offense as charged.

II. *Proof by Presumptions*

Since the offense of aggravated assault may be committed either knowingly or purposely, the offense may be proved by showing the act was knowingly done, and the legal presumptions that: "An unlawful act was done with an unlawful intent, and the legal presumption that a person is presumed to intend the ordinary consequences of his voluntary act," can be used to prove the mental state of knowingly.

Therefore, if you reason from facts proved in the evidence beyond a reasonable doubt that the defendant on or about the 21st day of January, 1974, in Pondera County, Montana, unlawfully caused Lana Harding bodily injury either with or without a weapon, the law expressly directs you to reason therefrom that he acted with unlawful intent that is purposely; and if you further reason from facts proved beyond a reasonable doubt that the harm inflicted by him was such as ordinarily results from an act such as defendant's, the law expressly directs you to reason that he intended the consequences of his act.

These presumptions "that an unlawful act was done with an unlawful intent", and "A person is presumed to intend the ordinary consequences of his voluntary act", are both rebuttable presumptions, each being subject to being controverted and overcome by other evidence as you may find the evidence to be.

39. CIRCUMSTANTIAL EVIDENCE—TEST OF SUFFICIENCY

You are instructed when the proof of any allegation required to prove a criminal offense against a defendant rests entirely on indirect or circumstantial evidence, the defendant may not be found guilty of the offense unless:

1. Each fact or circumstance which is presented to complete a chain of circumstances that will establish guilt must be proved beyond a reasonable doubt, and

2. Such proved facts and circumstances must be consistent only with a hypothesis of guilt and inconsistent with any other rational conclusion.

This does not mean that each proved fact or circumstance considered alone must be consistent only with a hypothesis of guilt, but that each fact or circumstance from which guilt may be deduced or reasoned must be proved beyond a reasonable doubt and that all of the proved facts and circumstances when considered together and as a whole give rise to the deduction or reasoning that the defendant is guilty. The doctrine of reasonable doubt applies only to the proof of guilt and not to proving that each link in a chain of evidence used to show guilt is consistent only with guilt. Any proved fact or circumstance when considered by itself may give rise to an inference which is as equally consistent with innocence as it is with guilt, but all of the proved facts and circumstances when considered together must be consistent only with a hypothesis or inference of guilt and inconsistent with any other rational inference or deduction.

40.

If the evidence in this case as to any particular charge is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's

APPENDIX—Continued

innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

41. PRODUCTION OF ALL EVIDENCE NOT REQUIRED

Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence.

42. DIRECT AND CIRCUMSTANTIAL EVIDENCE EQUALLY ENTITLED TO CONSIDERATION

Two classes of evidence are recognized and admitted in courts of justice, upon either or both of which, juries lawfully may base their findings, whether favorable to the State of Montana or to the defendant, provided, however, that to support a verdict of guilt the evidence, whether of one kind or the other or a combination of both, must carry the convincing quality required by law.

One type of evidence is known as direct and the other as circumstantial. The law makes no distinction between the two classes as to the degree of proof required for conviction or as to their effectiveness in defendant's favor, but respects each for such convincing force as it may carry and accepts each as a reasonable method of proof.

43. REGARDING FAILURE OF DEFENDANT TO TESTIFY

It is a Constitutional right of a defendant in a criminal trial that a defendant may not be compelled to testify.

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence, and upon the failure, if any, of the prosecution to prove every essential element of the particular charges against him. No lack of testimony on the defendant's part will supply a failure of proof by the prosecution so as to support by itself a finding against him on any essential element of a particular charge or charges.

If the defendant chooses not to testify you are not to consider his choice in any manner as evidence against him nor to allow it to prejudice your deliberations in any way.

44. CREDIBILITY OF WITNESSES AND PRESUMPTION OF TRUTH

The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The term "witness" includes every person whose testimony under oath has been received as evidence, whether by examination here in court or through deposition.

The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, that is whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is assumed to speak the truth. This assumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, for or against one or any of the parties; by the character of his testimony, or by contradictory evidence. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth.

APPENDIX—Continued

45. IMPEACHMENT BY CONTRADICTORY STATEMENTS

In respect to any attempt to impeach a witness by showing that on some former occasion he made a statement or statements that are contradictory of his testimony here, you are instructed that the evidence of any such contradictory statement is not received for the purpose of proving the truth of what then was said, but only for the purpose of testing the credibility of the witness; you are permitted to consider such evidence only for that purpose, and you are the exclusive judges of the effect of such evidence on the witness's credibility.

46. REGARDING EXPERT TESTIMONY

Duly qualified experts may give their opinions on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons stated therefor, if any, by the expert who gives the opinion. You are not bound to accept the opinion of an expert as conclusive, but you should give to it the weight to which you shall find it to be entitled. You may disregard any such opinion, if you find it to be unreasonable.

47. REGARDING EVIDENCE ADMITTED FOR A LIMITED PURPOSE

At times throughout the trial of this case evidence was admitted for a limited purpose or purposes. You are to consider the evidence admitted for a limited purpose or purposes for that purpose or those purposes only.

48. DIRECT EVIDENCE OF ONE WITNESS SUFFICIENT

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in this case.

49. DISTRUST OF WITNESS FOUND WILFULLY FALSE

A witness wilfully false in one material part of his testimony is to be distrusted in other parts thereof.

50. REGARDING COURT RULINGS ON EVIDENCE

At times throughout the trial, the Court will be called upon to pass on the question whether or not certain offered evidence may properly be admitted. You are not to be concerned with the reason for the rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made the Court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected, or any evidence that has been ordered stricken out by the Court, you, of course, must not consider the same; as to any questions as to which an objection was sustained, you must not conjecture as to what the answer might have been, or as to the reason for the objections, nor may you draw any inferences from the question itself.

51. DO NOT SPECULATE OR MAKE UNWARRANTED INFERENCES

Do not speculate, conjecture, or make unwarranted inferences as to what the

APPENDIX—Continued

facts might be, and do not assume the existence of any facts unless there is evidence to justify the conclusion. Nor can you act upon any information, other than the evidence given to you in court; that is, stipulations of counsel, exhibits admitted into evidence and witnesses whose sworn testimony is given and admitted in court. You should consider all of the evidence bearing either way on the question presented to you, regardless of which side has produced it.

You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number, or a presumption or other evidence which appeals to your mind with more convincing force.

This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

52. CHARGE OF DELIBERATE HOMICIDE BY LYING IN WAIT OR AMBUSH DISMISSED

The charge of Deliberate Homicide By Lying in Wait or Ambush has been dismissed by the Court and you are not to concern yourselves with this charge, contained in Count II of the Information filed against the defendant.

53. DEFENSE OF MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY

I.

The defendant has served notice on the Court that he suffers from a mental disease or defect which excludes his responsibility for the acts charged against him by the State of Montana and that he intended to introduce evidence in support of this defense.

By this notice and defense the defendant does not admit that he committed the acts charged against him, but in effect says if you find beyond a reasonable doubt that I did do said acts or any of them, that because of a disease or defect of the mind from which I suffered I was unable at that time to appreciate that said acts were criminal, or in the alternative, if I did appreciate the criminality of the acts I was unable because of said mental disease or defect to avoid the commission of said acts.

II.

Mental Disease or Defect Excluding Responsibility—Definition

A person is not responsible for criminal conduct, if at the time of such conduct, as a result of a mental disease or defect he is unable either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The term "mental disease or defect" does not include an abnormality or subnormality of the mind manifested only by repeated criminal or otherwise antisocial conduct, but does include any mental abnormality or subnormality that has reached the degree that a person affected thereby is unable to appreciate that an act is criminal; that is, that the act is wrong and is punishable by the law, and it also includes such persons who may know that acts are wrong and are subject to punishment, but are unable to avoid the commission of the prohibited acts, because of some mental abnormality or subnormality.

In the degree of their individual physical attributes and abilities people differ, and, likewise they differ individually in their degrees of intellect, their ability to understand and appreciate, their knowledge, their learning, their morality and in the degree that each is able to resist doing that which he or she knows to be wrong and punishable by law.

The law in order to protect the individual person and his or her rights recognizes that

APPENDIX—Continued

these mental differences exist, but in order to protect society the law does not measure and it does not even attempt to measure mental differences in individuals until and unless the differences in question have reached the point that the differences can be truly termed a mental disease or defect which precludes the power of thought and reason and either renders the afflicted person incapable of appreciating that an act is criminal, or is unable to resist doing the criminal act because of said mental disease or defect if he does appreciate the criminality thereof.

When the defense of mental disease or defect excluding responsibility for criminal conduct has been interposed the jury must determine under the definition thereof given by the Court and from all the evidence in the case whether or not the defendant suffered from such a disease or defect of the mind that it excludes his responsibility for the conduct charged against him.

III.

Burden of Proof—Mental Disease or Defect Excluding Responsibility for Conduct

Mental disease or defect excluding responsibility for criminal conduct is an affirmative defense, which means that the defendant must give advance notice thereof and prove this defense by a preponderance of the evidence.

By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has the more convincing force and the greater probability of truth.

The law has placed this burden on defendants in criminal cases because in law all persons are presumed to be free from mental diseases and defects which exclude their responsibility for conduct and to be accountable for their conduct (that is the law expressly directs the jury to so reason). This presumption that all persons are free from mental diseases and defects and are accountable for their conduct is a rebuttable presumption which the defendant has the burden of controverting and overcoming.

Therefore, if you find beyond a reasonable doubt that the defendant did do the act or any of the acts charged against him you are expressly directed by the law to deduce or reason that at the time of such conduct he was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

To overcome this express direction of the law the defendant must prove by a preponderance of the evidence, that he suffered from such an abnormality or subnormality of the mind at the time of such conduct that the jury cannot say that it does not have a reasonable doubt as to his responsibility for such conduct.

Since the defendant, by the interposing of the defense of disease or defect of the mind which excludes responsibility for conduct, does not admit any of the acts charged against him, and since the defense goes only to the mental responsibility and control of the defendant, you should first determine from the evidence in the case beyond a reasonable doubt whether the defendant did do the acts charged against him in the Information. If you find beyond a reasonable doubt that the defendant did do said acts or any of them you must then consider whether or not the defendant has overcome the presumption of accountability and whether or not he has created a reasonable doubt in your minds as to his mental accountability and responsibility for any of the acts you may find he committed, and whether or not he could have had the requisite mental state for the act or acts which you have found he committed.

54. VERDICT FORMS AND INSTRUCTIONS AS TO THEIR USE

Upon retiring to your jury room you will select one of the jurors to act as foreman, who will preside over your deliberations, and who will date and sign the verdict or verdicts and which you agree.

In order to return a verdict, all twelve jurors must agree to the decision, including the additional findings you are asked to make on the Guilty of Deliberate Homicide

APPENDIX—Continued

verdict form and on the Guilty of Aggravated Kidnapping verdict form.

I.

Verdict Form—Mental Disease or Defect Excluding Responsibility for Conduct

If after considering all of the charges made against the defendant you have found that the defendant committed the acts charged, or did commit any of the acts charged, and have further determined that he suffered from a mental disease or defect which excludes his responsibility for said act or acts, you are furnished with a form upon which to return such a verdict, to wit: Not Guilty of any of the offenses charged against him because of a mental disease or defect which excludes responsibility for his conduct.

If you reach this verdict have your foreman date and sign this verdict form and return with it to the courtroom.

If, of course, you do not find that the defendant committed any of the acts charged, you will not need to use this form, but instead will return a verdict of Not Guilty of any of the offenses charged against him on a verdict form furnished you for such a verdict.

II.

Verdict Forms—Deliberate Homicide

You are to consider each and all of the charges remaining against the defendant, and even though you may find more than one or all of said charges to have been proved beyond a reasonable doubt, as only one death is alleged, only one Guilty of Deliberate Homicide verdict form is required.

You are also furnished with a Not Guilty of Deliberate Homicide verdict form to use if such is your verdict.

If you adopt the Guilty of Deliberate Homicide verdict form you are asked to find on that form whether the Deliberate Homicide was or was not By Means of Torture as this is the most serious of the remaining charges of Deliberate Homicide made against the defendant.

After you have reached a verdict on the charges of Deliberate Homicide, whether Guilty or Not Guilty, you are still required to return a verdict on the charges of Aggravated Kidnapping. Have your foreman date and sign the verdict form upon which you agree on the charges of Deliberate Homicide and take up the Charges of Aggravated Kidnapping.

III.

Verdict Forms—Aggravated Kidnapping

Since only one Aggravated Kidnapping is alleged, though in different ways and for different purposes, you are to consider all of the charges of Aggravated Kidnapping made against the defendant and even though you may find more than one or all of the charges of Aggravated Kidnapping to have been proved beyond a reasonable doubt you are furnished with only one verdict form upon which to return a verdict of Guilty of Aggravated Kidnapping.

You are also furnished with a Not Guilty of Aggravated Kidnapping verdict form to use if such is your verdict.

If you adopt the Guilty of Aggravated Kidnapping form you will be required to find on that form whether Lana Harding did or did not die as a result of said Aggravated Kidnapping.

After you have reached a verdict on the Charges of Deliberate Homicide and a verdict on the charges of Aggravated Kidnapping, if you have found him Guilty of Deliberate Homicide or Guilty of Aggravated Kidnapping or Guilty of both of said offenses, have your foreman date and sign the verdict forms and return with them to the Court, for if you have found him guilty of either or both Deliberate Homicide and/or Aggravated Kidnapping the remaining charges of Sexual Intercourse without Consent, Aggravated Assault and Kidnapping are all lesser offenses which are included in the charges of Deliberate Homicide, and Aggravated Kidnapping in this case.

If you have found the defendant Not Guilty of Deliberate Homicide and Not Guilty of Aggravated Assault you are required then to return a verdict on the charge of Sexual Intercourse Without Consent which is the most serious of the remaining charges.

APPENDIX—Continued

IV.

Verdict Forms—Sexual Intercourse Without Consent

If you have adopted the Not Guilty of Deliberate Homicide verdict form and have adopted the Not Guilty of Aggravated Kidnapping verdict form, you have been furnished with a verdict form for Guilty of Sexual Intercourse Without Consent and a verdict form for Not Guilty of Sexual Intercourse Without Consent. Use the form which you find to be appropriate.

If you adopt the Guilty of Sexual Intercourse Without Consent Verdict Form, have your Foreman date and sign the form and return with it to the Courtroom.

If you adopt the Not Guilty of Sexual Intercourse Without Consent you are then required to take up the charges of Aggravated Assault.

V.

Verdict Forms—Aggravated Assault

If you have found the defendant Not Guilty of Deliberate Homicide, and Not Guilty of Aggravated Kidnapping and Not Guilty of Sexual Intercourse Without Consent, you are to consider all of the charges of Aggravated Assault made against the defendant and even though you may find more than one or all of said charges of Aggravated Assault to have been proved beyond a reasonable doubt, only one Guilty of Aggravated Assault verdict form is furnished upon which to return such a verdict.

You are also furnished with a Not Guilty of Aggravated Assault verdict form if such is your verdict.

If you adopt the Guilty of Aggravated Assault verdict form, have your foreman date and sign the form and return with it to the Courtroom.

If you adopt the Not Guilty of Aggravated Assault verdict form, you are required to reach a verdict on the remaining charge of kidnapping.

VI.

Verdict Forms—Kidnapping

If you have adopted the verdict form Not Guilty of Deliberate Homicide and the verdict form not guilty of Aggravated Kidnapping and the verdict form Not Guilty of Sexual Intercourse Without Consent and the verdict form Not Guilty of Aggravated Assault, you have been furnished with a verdict form upon which to return a verdict of Guilty of Kidnapping and a verdict form upon which to return a verdict of Not Guilty of Kidnapping.

If you adopt the Guilty of Kidnapping verdict form, have your foreman date and sign it and return with it to the Courtroom.

If you adopt the Not Guilty of Kidnapping verdict form you will have acquitted the defendant of all charges made against him, and rather than returning separate and multiple Not Guilty verdict forms, you have been furnished with a verdict form for Not Guilty of Any of the Offenses charged against him. Have your foreman date and sign this verdict and return with it to the Courtrcom if this is your verdict.

VII.

Verdict Form—Not Guilty of any of the Offenses Charged.

This form is for your use if you find that the defendant is not guilty of any of the offenses charged against him, and have not adopted the verdict form of Not Guilty of any of the Offenses charged because of a Mental Disease or Defect which excludes responsibility for conduct.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

DUNCAN PEDER McKENZIE, JR., Petitioner, -vs- HENRY RISLEY, as Warden of Montana State Prison, Respondent.	)	CV-81-170-GF MEMORANDUM OPINION

This habeas corpus petition by Duncan Peder McKenzie, Jr., is before the Court on cross-motions for summary judgment. The Court has reviewed many documents, briefs, exhibits, reported judicial opinions, and the trial transcript. Eighteen issues are presently before the Court, ranging from arbitrary imposition of the death penalty to vagueness in the circumstances relied on to impose the death sentence. For the reasons discussed below, the motion for summary judgment made by the State of Montana is granted on seventeen claims; decision on the remaining claim is reserved.

This Court is reluctant to add to the growing mountain of judicial opinions arising out of McKenzie's conviction for the brutal murder of Lana Harding in January 1974. The Court declines to issue a weighty 100-page tome devoted to repetition of information available in other published opinions. The interested reader is directed to the opinions listed in Procedure, infra, for a more detailed

explanation of the facts giving rise to this case and a discussion of the thorough judicial evaluation petitioner has received in the state and federal courts.

FACTS

Briefly stated, petitioner was convicted of deliberate homicide and aggravated kidnapping by a jury verdict in the Montana District Court of Cascade County, Judge R. J. Nelson, presiding, in January 1975. The victim, Lana Harding, was a 23-year-old female school teacher who lived and taught at a country school in Pondera County. There was evidence she had been sexually assaulted, strangled with a rope and repeatedly struck about the head with an automobile engine exhaust manifold.

Further development of the facts surrounding the murder, arrest, trial and sentencing of petitioner will be limited to the extent required by the analysis of related issues.

PROCEDURE

The procedural history of petitioner's conviction as developed in reported opinions is as follows:

1) State ex rel. McKenzie v. District Court of the Ninth Judicial District, 165 Mont. 54, 525 P.2d 1211 (1974) (Writ of Supervisory Control to set aside Second Amended Information).

2) State v. McKenzie, 171 Mont. 278, 557 P.2d 1023 (1977) (affirming conviction and sentence) (McKenzie I).

3) McKenzie v. Montana, 433 U.S. 905 (1977) (vacating the judgment of the Montana Supreme Court, remanding the case for further consideration in light of Patterson v. New York, 432 U.S. 197 (1977)).

4) State v. McKenzie, 177 Mont. 280, 581 P.2d 1204 (1978) (affirming conviction and sentence) (McKenzie II).

5) McKenzie v. Montana, 443 U.S. 903 (1979) (vacating Montana Supreme Court's judgment, remanding for consideration in light of Sandstrom v. Montana, 442 U.S. 510 (1979)).

6) State v. McKenzie, 186 Mont. 481, 608 P.2d 428, (1980) (affirming conviction and sentence) (McKenzie III).

7) McKenzie v. Montana, 449 U.S. 1050 (1980) (Certiorari denied; dissenting opinion in favor of granting certiorari).

8) McKenzie v. Osborne, ___ Mont. ___, 640 P.2d 368 (1981) (dismissal of post-conviction relief in State District Court, affirmed) (McKenzie IV).

FEDERAL REVIEW OF HABEAS CORPUS PETITIONS

Petitioner's facts and arguments now before this Court appear identical to those presented to the Montana Supreme Court. There exists a presumption that state court factual determinations are correct. Sumner v. Mata, 440 U.S. 539 (1981); 28 U.S.C. § 2254(d). These factual determinations are to receive a high measure of deference--they can be rejected only if the state court findings lack fair support in the record. Marshall v. Lonberger, 103 S.Ct. 843, 850 (1983). State court conclusions of law do not enjoy the same presumption of correctness. Mata v. Sumner, 649 F.2d 713, 716 (9th Cir. 1981).

Respondent seeks summary judgment on the majority of claims raised by petitioner. The parties have agreed that certain claims could be determined as a matter of law. These include petitioner's claims ¶¶ 14, 16, 20, 21, 22, 23, 24, 26, 27, 28. Petitioner requests an evidentiary hearing on

six additional claims: ¶ 18, ¶ , 29, 31, 32, 33. Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Respondent has met that heavy burden; the Court finds no need for an evidentiary hearing to resolve a dispute of material fact or to add to the record on any claim considered in this opinion.

This opinion will be divided into a discussion of conviction-related issues and sentence-related issues. For ease of reference, each claim will be identified by the corresponding paragraph in the habeas corpus petition and examined in numerical order.

CONVICTION ISSUES

Search and Seizure (¶ 14)

Petitioner alleges that the search warrant giving rise to evidence presented at trial was defective.

Review of Fourth Amendment search and seizure claims under 28 U.S.C. § 2254 is barred if the state courts provided the petitioner the opportunity for full and fair litigation of his claims. Stone v. Powell, 428 U.S. 465, 482 (1976). Under Stone v. Powell, a federal district court may not relitigate a Fourth Amendment issue tried fully and fairly in the state court, regardless of its view of the correctness of the state decision. Mack v. Cupp, 564 F.2d 898, 901 (9th Cir. 1977). Although the Supreme Court has never defined the circumstances constituting the opportunity for full and fair litigation in the state courts, numerous courts of appeal have arrived at such standards. The Fifth

Circuit Court of Appeals in Swicegood v. Alabama, 577 F.2d 1322 (5th Cir. 1978), held that the existence of an opportunity for full and fair litigation depended on the availability of state court procedures which were adequate to protect Fourth Amendment rights. Thus, the bar on federal court review as set forth in Stone v. Powell may be avoided only if processes provided by the state are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims on their merits. Petitioner has made no showing that Montana's procedure for review of Fourth Amendment claims are routinely or systematically applied to prevent the actual litigation of Fourth Amendment claims on their merits. As indicated by the lengthy list of court procedures involved in this case, most of which involved consideration of the search and seizure questions raised by the petitioner, the Montana courts have afforded petitioner more than ample opportunity for full and fair litigation of his Fourth Amendment claims.

In any case, the search can be sustained on the basis of probable cause shown in the affidavit of County Attorney David Nelson. See, McKenzie III at 437-38. Nor was an unconstitutional search authorized by the phrase "any other controhand [sic] articles" within the warrant. Such a phrase merely authorizes seizures of items that could be seized without a warrant under the plain view doctrine. Quigg v. Estelle, 492 F.2d 343, 345 (9th Cir.), cert. denied sub nom Quigg v. Warden, 419 U.S. 848 (1974).

In Pennsylvania v. Sheppard, 52 U.S.L.W. 5177 (July 5, 1984), the United States Supreme Court held that the federal constitution does not require the exclusion of disputed evidence when the officer conducting the search acted in objectively reasonable reliance on a warrant issued by a detached and neutral magistrate, if the warrant is subsequently determined to be invalid. No court has found the warrant issued here to be invalid. Nevertheless, even accepting petitioner's claim of invalidity it is apparent from the record that the officers conducting the search acted reasonably, in good faith reliance on the warrant issued by the magistrate. Thus, even if the warrant was defective as petitioner claims, the evidence discovered could not be suppressed.

For the alternative and independent reasons cited above, petitioner's claim in ¶ 14 must be denied.

Violations of Discovery Duties (¶ 15)

Petitioner alleges that the state violated discovery orders and statutory discovery duties and thereby denied him a fair trial. These claims arise from two distinct alleged violations. McKenzie alleges that he was denied, after request had been made, statements from the State's proposed witnesses or others. Secondly, petitioner alleges that the naming of 58 witnesses on the morning of the first day of trial also prejudiced his right to prepare a defense.

Petitioner's attorney made a formal demand for copies of reports of expert examinations together with a

request to inspect physical evidence. Contrary to the assertion in ¶ 15(b) of the petition, no document or record makes any request for statements from the State's proposed witnesses or others. The first formal demand for statements of witnesses was filed on January 13, 1974,[5] after trial had begun. Pursuant to the direction of the trial court the record reflects that statements of witnesses who testified were produced prior to the receipt of the witnesses' testimony at trial. See, e.g., Transcript at p. 1144: lines 7-22.

Concerning the 58 witnesses named on the day of trial, petitioner has failed to identify a single witness who testified without first being interviewed by defense counsel. Only 15 of the endorsed witnesses eventually testified at trial. Of these, six were expert FBI agents whose reports had been furnished to defense counsel prior to testifying. The remaining nine witnesses were personnel connected with Wright Chevrolet, a garage in which the petitioner's truck was stored after its seizure. The first of these nine witnesses testified on January 21, 1975, two weeks after endorsement on the amended information. The record simply does not support the assertion that the petitioner was unable to prepare for these witnesses due to their "surprise" listing on the information. Although the naming of the witnesses appears at first glance to have been unfair, an examination of the record and petitioner's claims shows no prejudice. McKenzie III at 442. Petitioner cites no authority that the naming of the witnesses on the first day of trial violated due process of law. A criminal defendant has no federal due

a certain right to discovery of statements of witnesses. United States v. Augenblick, 393 U.S. 348, 356 (1969). Similarly, the Constitution does not require the state to notify a defendant prior to trial of the witnesses it intends to call. See Wardius v. Oregon, 412 U.S. 470, 475 (1973).

Petitioner asserts that the facts underlying this claim are disputed, and it is therefore not ripe for summary judgment. The record, however, reflects that the petitioner's factual assertions in support of ¶ 15 are incorrect. In any case, because the petitioner can assert no constitutional right to the discovery he claims to have been denied, any factual dispute is simply immaterial. The respondent is therefore entitled to judgment as a matter of law on this claim.

Defenses Based on Mental Disease (¶ 16)

Petitioner alleges that he was denied his constitutional rights under the Fifth, Sixth and Fourteenth Amendments by the trial court's refusal to grant a bifurcated trial on the issue of mental disease or defect, by its order requiring petitioner to submit to an interview with a psychiatric expert appointed by the Court, and by its admission of testimony by the prosecution's psychiatric expert relating to petitioner's silence concerning the events surrounding the murder of Lana Harding.

Petitioner has no constitutional right to request a bifurcated trial on the issue of mental disease or defect. Garrison v. Patterson, 405 F.2d 696, 697 (10th Cir. 1969), cert. denied, 404 U.S. 880 (1971).

Petitioner notified the trial court of his intent to rely on mental disease as an element of his defense. Once the petitioner made this intention known to the trial court, he waived any Fifth Amendment objection to compelled psychiatric examination. Karstetter v. Cardwell, 526 F.2d 1144 (9th Cir. 1976). Furthermore, the trial court did not violate petitioner's constitutional rights by compelling him to disclose his psychiatrist's report to the prosecution on pain of forfeiting his right to present evidence on the mental disease defense. Karstetter, 526 F.2d at 1144. The petitioner received reciprocal discovery of the prosecution's psychiatric reports.

During the testimony of the state's two psychiatric experts, references were made to the petitioner's refusal to discuss the events surrounding Lana Harding's death. On advice of counsel, petitioner refused to discuss with the Court-appointed psychiatrists events surrounding the evening of Lana Harding's death. Information surrounding Lana Harding's death was not privileged because the petitioner had waived his Fifth Amendment rights by asserting his mental disease defense. The petitioner's silence was only mentioned in terms of the difficulties it presented in reaching a diagnosis. Neither witness suggested that any inculpatory inference should be drawn from the petitioner's silence. One expert explicitly drew contrary inferences that he presumed the petitioner innocent. Transcript at 2436, lines 14-22. Moreover, only adverse comments by witnesses on defendant's silence are prohibited by the Fifth Amendment. Doyle v. Ohio,

426 U.S. 610 (1976); Custer v. Kentucky, 45[illegible] U.S. 288, 298 (1981); Lakeside v. Oregon, 435 U.S. 333 (1978). The comments of the experts did not suggest adverse inferences should be drawn by the jury from petitioner's silence; thus, no Doyle violation is present. Respondent is entitled to summary judgment on these claims.

Compulsory Process and Order of Proof (¶ 18)

Petitioner alleges that he was denied his constitutional rights by the trial court's refusal to hold subpoenaed witnesses under the power of the court until petitioner could use them in his case-in-chief and by the trial court's requirement that the petitioner present certain witnesses for the defense before the state rested its case-in-chief.

The prosecution called seven expert witnesses during its case in chief to testify as to their scientific examination of the evidence. All seven of these witnesses were from other states, and all seven testified under prosecution subpoena. At the close of their testimony, the State moved to release them from subpoena so that they could attend to other business. The court released the witnesses from subpoena, reserving to defendant the right to resubpoena the witnesses. See, e.g., Transcript at 1182: line 14; Transcript at 1321: 22; 1371: 12.

Petitioner argues that by releasing these witnesses from subpoena the trial court denied the opportunity to petitioner to lay foundation for admission of unidentified exhibits. This argument is without merit. Defense counsel had ample opportunity prior to trial to examine the exhibits

and the DNA reports and determine which exhibits were relevant and what expert testimony was necessary as foundation. As noted above, the trial judge continually asserted his willingness to enforce defense subpoenas of these witnesses. Defense counsel sought only one subpoena and that subpoena was honored by the court.

Petitioner further alleges that the trial court's requirement that he examine certain witnesses during the state's case-in-chief violated his constitutional rights. The right to compulsory process does not guarantee a defendant the right to present his witnesses in any particular order. Cases explicitly recognize that the order of trial rests in the discretion of the trial judge and that the trial judge may alter the order of trial in consideration of the schedules of out-of-state or expert witnesses. See, e.g., United States v. Hite, 461 F.2d 646, 647 (6th Cir. 1972). Petitioner's citation to Brooks v. Tennessee, 406 U.S. 605 (1972), in support of his position is in error. That case involved a court's order requiring the defendant to testify before any other defense witnesses. No such circumstance existed here. The trial judge acted within the permissible limits of discretion in this case concerning the order and release of subpoenaed expert witnesses.

Although the petitioner asserts that the factual basis for this claims is substantially in dispute, and that an evidentiary hearing may be required, the Court disagrees. The record shows to a certainty that the witnesses were made available for the petitioner, which refutes his claim that he

was denied compulsory process. Respondent is entitled to judgment as a matter of law on these claims.

Sandstrom Instructions (P. 20)

Petitioner alleges that he was denied his constitutional rights by the trial court's instructions to the jury containing statements that "the law presumes a person intends the ordinary consequences of his voluntary acts" and that "an unlawful act is done with unlawful intent." See Instructions Nos. 30, 33, 37, 38.

The instructions cited by petitioner are identified as "Sandstrom instructions" because these types of instructions were first declared unconstitutional by the United States Supreme Court in Sandstrom v. Montana, 442 U.S. 510 (1979). The Sandstrom instruction can deny a defendant his constitutional right to the presumption of innocence if, under the facts of the case, it serves to shift the burden of proof from the prosecution to the defense on the element of intent. Id. The giving of the Sandstrom instructions was error. However, it remains to be determined whether the error was harmless constitutional error or requires the granting of the writ of habeas corpus. Chapman v. California, 386 U.S. 18 (1967) (rejection of a rule of automatic reversal for all constitutional errors).

Four factors must be considered in the Court's analysis of this issue. They are 1) the jury verdict under proper instructions that petitioner had the specific intents associated with deliberate homicide by means of torture and aggravated kidnapping; 2) the jury finding that petitioner

did not suffer from mental disease or defect, that is, that petitioner had the mental capacity to form both general and specific intent; 3) that while petitioner's mental capacity was at issue in the trial, the question of actual intent to commit the criminal acts charged was not itself an issue;[1] and 4) that the jury properly found that petitioner committed the extremely brutal murder.

The jury found the petitioner had the specific intents associated with the offense of deliberate homicide by means of torture and aggravated kidnapping.[2] The court explicitly instructed the jury that it could not utilize Sandstrom presumptions in finding specific intent. "In offenses which require proof of a particular purpose the purpose required may never be proved by means of legal presumptions but must be proved by means of inferences only." Instruction 32. The court's instruction relating to deliberate homicide by means of torture indicated that:

> The mental state of purposely assaulting another physically to inflict cruel suffering upon that person for a particular purpose cannot be proved by using the legal presumption you have been directed to use in the proof of deliberate homicide, and must be proved by the use of inferences alone. Instruction No. 34.

[1] Criminal intent can be challenged at two levels--by denying the mental capacity to form an intent, and by denying the action was taken intentionally, i.e., the action was the result of accident or negligence.

[2] The jury found that petitioner physically assaulted Lana Harding with the specific intent to extort something, to persuade her to act against her will or to satisfy an untoward propensity. Instruction No. 34. The jury further found that petitioner kidnapped Lana Harding with the specific intent to inflict bodily injury, commit sexual intercourse, or an aggravated assault. Instruction No. 36.

The Court's instruction No. 10, detailing the method of proof for aggravated kidnapping reads similarly. Assuming, as the Court must under Parker v. Randolph, 442 U.S. 62, 73 (1979), that the jury followed the trial court's instructions, it is apparent that the jury did not rely on the improper Sandstrom instructions in reaching its findings of specific intent.

The jury's determination indicates beyond all doubt that petitioner was capable of forming the general intent referred to in the Sandstrom instructions. Because the jury properly found that petitioner had the requisite specific intents, we are logically compelled to recognize that the jury found petitioner to have the mental capacity necessary for the specific intents. This finding of mental capacity directly rejects the only testimony offered at trial by petitioner related to the issue of intent--the testimony of psychiatrist Dr. Wetzler. Simply put, the jury rejected Dr. Wetzler's testimony that petitioner lacked the capacity to form any criminal intent. (Dr. Wetzler did not distinguish between petitioner's capacity to form specific or general intent.) It is inconceivable that petitioner could be capable of forming specific intent and yet incapable of forming general intent.

The Sandstrom instructions are of the form, "if the jury finds these circumstances (e.g., that petitioner committed a brutal murder), then the jury must presume general intent." Even if the jury utilized these instructions, it must first have found the circumstances; that is, the jury was logically compelled to find that petitioner committed the

crime charged before it could determine the presence or absence of intent.[3] Having made a determination that petitioner committed the brutal murder, was it likely that the jury utilized the Sandstrom instructions? As articulated by the Montana Supreme Court:

> [T]he question remains whether defendant in fact had the requisite intent when he kidnapped and killed the victim. Here the evidence is undisputed and permits only one rational conclusion.
>
> From the beginning there was no real or genuquestion regarding intent in this case. There was uncontroverted and compelling evidence of the vicious manner in which the crimes were committed from which no rational conclusion could be drawn that the defendant lacked the intent to kidnap and kill the victim. The pathologist who examined the body of the victim testified how the killing occurred. He stated there was evidence of sexual intercourse in close proximity to the time of death and that a dry stain in the victim's pubic hair, vaginal canal, contained human male semen. He also testified that the evidence as consistent with the fact that the victim had been dragged. Nine abraded bruises were found on the front part of the victim's chest in the area of her breasts. A segment of used clothesline rope had been found around the victim's neck which had been severely constricted about 45 minutes before her death causing injuries severe enough to completely compress the airway into her lungs. Finally, there was evidence of several blows to the victim's head. The death blow had left open the entire side of her head. Blood and brain tissue matching those of the victim were found on the exhaust manifold.
>
> There is no other evidence. The evidence on the issue of intent is overwhelming, uncontradicted, and permits but one rational conclusion -- that defendant purposefully and knowingly intended to kidnap and kill her. We conclude that a reasonable juror could not have found otherwise in the proof presented by the state, the instructions on rebuttable presumptions notwithstanding. . . . McKenzie IV at 459.

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[3] See Connecticut v. Johnson, 103 S.Ct. 969, 982 (1983) (dissenting opinion by Justice Powell).

The findings and conclusions of the Montana Supreme Court mirror this Court's opinion.

Having determined that the jury properly found that petitioner did not suffer from any mental disease or defect and that he had the requisite specific intents, that petitioner nowhere argued that the charged offenses were committed unintentionally, inadvertently or accidentally, and that petitioner committed the brutal murder, it remains to identify the proper test applicable to the determination whether the Sandstrom instructions were harmless error.

It is well established that when a federal constitutional error occurs, the state has the burden to convince the reviewing court that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). In McKenzie v. Montana, 443 U.S. 903 (1979), the United States Supreme Court remanded McKenzie's case to the Montana Supreme Court for a harmless error analysis of the Sandstrom instructions. The Montana Supreme Court in McKenzie III applied an "overwhelming weight of the evidence" test to the error and declared it believed that the unconstitutional jury instruction was harmless beyond a reasonable doubt. McKenzie III at 459. The Supreme Court denied certiorari. McKenzie v. Montana, 449 U.S. 1050 (1980).

Two recent decisions have refined the harmless error test where Sandstrom instructions are involved. In Connecticut v. Johnson, 103 S.Ct. 969 (1983), the Supreme Court held that:

> There may be rare situations in which the reviewing court can be confident that a Sandstrom error did not play any role in the jury's verdict. For example, if the erroneous instruction was given in connection with an offense for which the defendant was acquitted and if the instruction had no bearing on the offense for which he was convicted, it would be appropriate to find the error harmless. In addition, a Sandstrom error may be harmless if the defendant conceded the issue of intent. In presenting a defense such as alibi, insanity or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury apply the erroneous instruction as to permit the appellate court to consider the error harmless. We leave it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury. Id. at 977-78 (citations omitted).

Thus, the plurality opinion viewed the Sandstrom instructions as "the functional equivalent of a directed verdict" because in general it is impossible to find whether the jury relied on the evidence or the presumption in resolving the intent issue. Id. at 976. Here, it is possible to make such a finding. The trial court's instructions Nos. 32, 34 and 36 did not permit a "directed" finding of mental capacity or the presence of the requisite specific criminal intent. The plurality opinion in Connecticut simply does not address the situation and left it to this Court to determine the relationship between the Sandstrom instructions and the issue of intent, rather than impose a rigid rule that could not be flexibly applied to the myriad of possible fact situations.

The Ninth Circuit Court commented on the constitutional error problem raised by the Sandstrom instructions in Petition of Hamilton, 721 F.2d 1189 (9th Cir. 1983); see also McGuinn v. Crist, 657 F.2d 1107 (9th Cir. 1981). In Hamilton,

The Circuit Court announced a two-step inquiry for determining whether the Sandstrom instruction error was harmless. First, the reviewing court must determine whether intent was disputed at trial; if it was, then the error cannot be harmless. If intent was not disputed, then the second step is to determine whether any reasonable juror could have given the presumption conclusive or persuasion-shifting effect. Hamilton, at 1192. Unfortunately, this dichotomy does not exhaust the possible situations. Here, we have a situation where specific intent was disputed but was constitutionally found by the jury, the petitioners claim of mental disease or defect was properly rejected by the jury, and no defense was raised that the perpetrator of the crimes lacked actual intent (as opposed to petitioner's claim that he lacked the capacity to form intent)--hardly a case that fits neatly into the Hamilton scheme.

The situation here appears to be unique; on the one hand lawful instructions were given concerning specific intents, and on the other hand erroneous instructions-were given concerning general intent. Neither test identified by the Supreme Court or the Ninth Circuit addresses this unique situation. That is, whether "intent is at issue" cannot receive a simple answer. The Court believes that more fundamental than the various courts' shorthand reference to the intent-at-issue test, is the Supreme Court's concern that the giving of the Sandstrom instruction would be equivalent to a directed verdict on the issue of intent. This is unequivocally not the case here because the jury properly found the

requisite specific intents. Clearly, the threshold "intent-at-issue" test is not applicable in the unique circumstances presented. Accordingly, the Court proceeds to the determination whether any reasonable juror could have given the presumption conclusive or persuasion-shifting effect.

As noted above, the jury properly found the petitioner committed the acts that led to the death of Lana Harding, that he had the mental capacity to act with the proper general intent and that he had both the mental capacity and did act with the requisite specific intents. Furthermore, petitioner did not contest actual intent, only his capacity to form any intent (a claim rejected by the jury). From these facts as properly found by the jury, together with the brutality of the murder of Lana Harding, the Court finds that no reasonable juror could have given the Sandstrom instructions conclusive or persuasion-shifting effect; the evidence and proper findings by the jury were sufficient such that a properly instructed jury would certainly have found that petitioner acted with the requisite general intent; beyond a reasonable doubt the constitutional error introduced by the Sandstrom instructions did not contribute to the verdict.

SENTENCE ISSUES

Equal Protection (¶ 21)

Petitioner alleges that the Montana Courts failed to apply rules of state law that would have resulted in reversal of his conviction. Petitioner cites five errors:

1. looking outside the four corners of County Attorney Nelson's affidavit to find probable cause for the search warrant;

2. refusing to find a speedy trial violation;

3. approving the trial court's refusal of a jury instruction on the lesser included offense of mitigated deliberate homicide;

4. finding the Sandstrom-type errors to be harmless beyond a reasonable doubt;

5. not applying current capital sentencing procedures in petitioner's case.

These allegations fail to state a claim for relief under the equal protection clause. Beck v. Washington, 369 U.S. 541, 554-55 (1962).

The evidence identified by the Montana Supreme Court as providing probable cause for the search warrant all appeared within the "four corners" of the Nelson affidavit. McKenzie III at 437-38. The "four corners" rule for search warrants applies in Montana as a matter of state law. Article II, § 11, Montana Constitution; Mont. Code Ann. (MCA) § 46-5-202 (1979). Petitioner's speedy trial allegations rest on the assertion that the petitioner was denied the benefit of a presumption of prejudice arising under Montana law. Petition, ¶ 21(b). These claims are based on state law and are therefore beyond this Court's jurisdiction under 28 U.S.C. § 2254.

The Montana Supreme Court found that the evidence in petitioner's trial did not warrant instructions on the lesser offense of mitigated deliberate homicide. The determination of whether to give an instruction on a lesser included offense is purely a question of state law. Petitioner

has cited no case in which the Montana Supreme Court has held that evidence of mental disease, without more, justifies an instruction on the offense of mitigated deliberate homicide. Petitioner relies on Beck v. Alabama, 447 U.S. 625 (1980). This citation is inapposite. Beck concerned the propriety of a statute forbidding the submission of lesser offenses to a jury in capital cases even where the evidence supported the lesser offenses. No such statute is involved here.

The determination made by the Montana Supreme Court that the Sandstrom instructions were harmless error beyond a reasonable doubt was correct. See Sandstrom Instructions ¶ 20 supra. Therefore, no equal protection claim can arise from such a holding.

The Montana courts were under no obligation to resentence the petitioner sua sponte after the statutes under which he was originally sentenced were amended, repealed, and replaced with the current capital sentencing statutes. The statute under which petitioner was sentenced has never been held unconstitutional. No equal protection claim is stated here. Moreover, the petitioner never sought to be resentenced under Montana's current capital sentencing statutes in the Montana courts.

These equal protection claims fail to show the petitioner is entitled to relief under 28 U.S.C. § 2254. The respondent is therefore entitled to summary judgment on the claims in ¶ 21 of the petition.

Death Penalty Statute (¶ 22)

Petitioner alleges that his death sentence was imposed in violation of his constitutional rights because the statute under which his sentence was imposed explicitly permitted discretionary sentencing, thus permitting arbitrary and discretionary imposition of the death penalty. Petitioner was sentenced to death under the Revised Codes of Montana [RCM] (1947) § 94-5-105(1)(d) 1947 (Supp. 1974), and RCM 1947 § 94-5-304 (Supp. 1974). These statutes established six categories of deliberate homicide and one category of aggravated kidnapping for which the death penalty was required "unless there are mitigating circumstances." These statutes have been repealed.

This Court rejects petitioner's argument that because these statutes were facially similar to statutes invalidated by the Supreme Court they were necessarily unconstitutional. The construction of a capital sentencing statute by the state courts can cure facial shortcomings in the statute. Jurek v. Texas, 428 U.S. 262, 271-73 (1976).

A death sentence may be imposed if the discretion of the sentencer is guided by objective criteria that differentiate among cases in which the death penalty is appropriate. Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980). There appear to be three constitutional requirements. First, the statutes must focus the sentencer's attention on the circumstances of the crime that justify imposition of the death penalty. Gregg v. Georgia, 428 U.S. 153, 196-97 (1976) (use of statutory aggravating circumstance to direct attention to

the circumstances of the crime); Jurek v. Texas, 428 U.S. at 270 (1976) (narrow definition of statutory offense of capital homicide). Secondly, the statute must allow consideration of a full range of mitigating circumstances. Eddings v. Oklahoma, 102 S.Ct. 869, 874 (1984). Finally, there must be meaningful appellate review. Harris v. Pulley, 692 F.2d 1189, 1196-97 (9th Cir. 1982); rev'd on other grounds, 104 S.Ct. 871 (1984).

The sentencing statutes applied to petitioner met the first criterion by narrowly defining the class of cases to which the death penalty could apply.[4]

Montana's statutes expressly recognized that the sentencing court must consider mitigating circumstances before it can impose the death penalty. Both death penalty statutes cited above provided that the court "shall" impose a sentence of death "unless there are mitigating circumstances". McKenzie III at 450. The Montana Supreme Court held that the presentence investigation authorized in RCM 1947 § 95-2204 must present whatever mitigating circumstances may have existed. McKenzie III at 450. Combining the two provisions, the sentencing court was required to consider

[4] Under RCM 1947 § 94-5-105 (Supp. 1974), the death penalty could apply only if: 1) the offense of deliberate homicide was committed by an inmate of the state prison; 2) the defendant had a previous deliberate homicide conviction; 3) the victim was a peace officer killed in the line of duty; 4) the homicide involved torture; 5) the defendant committed the homicide while lying in wait or ambush; 6) the homicide was part of a plan which, if completed, would result in the death of more than one person. Under RCM 1947 § 94-5-304 (Supp. 1974), the death penalty was available for aggravated kidnapping only if the victim died as a result of the criminal conduct.

both mitigating circumstances and the presentence investigation report. Sentencing courts were directed by RCM 1947 § 95-2201 to perform their sentencing functions to the end that persons convicted of a crime be dealt with in accordance with their individual characteristics, circumstances, needs and potentialities. Finally, petitioner was authorized to seek a hearing to present to the trial court his testimony and evidence in mitigation of punishment. Id. This procedure for considering and evaluating mitigating circumstances was substantially indistinguishable from that sustained by the Supreme Court in Jurek v. Texas, supra.

The final requirement demands the availability of prompt judicial review of the sentencing decision by a court of statewide jurisdiction. The Montana Supreme Court held that compliance with statutory requirements would be considered by the Montana Supreme Court on appeal, while the proportionality of the sentence would properly be considered by the Sentence Review Division. McKenzie III at 450. This Court finds that procedure facially adequate to serve as the necessary additional check of appellate review.

The sentencing statutes as construed and applied by the Montana Supreme Court complied with the requirements set forth by the United States Supreme Court. Respondent is therefore entitled to summary judgment on this claim.

Proportionality Review (¶ 23)

Petitioner challenges the appellate review of his death penalty by the Montana Supreme Court and the Sentence Review Division on grounds of unconstitutionality.

On December 11, 1978, the appropriateness and proportionality of petitioner's sentence was considered by the Sentence Review Division of the Montana Supreme Court. The transcript of this proceeding is before the Court. Petitioner presented no evidence on the issue of the proportionality of his sentence except for a single request that the Sentence Review Division obtain the records of all homicide cases filed in Montana since 1973. The suggestion was rejected. However, the State presented facts of other capital cases that had been appealed to the Montana Supreme Court. After deliberation, the Sentence Review Panel[5] left the petitioner's sentence undisturbed, finding explicitly that "[t]he sentence imposed is not inappropriate to the crimes of which the defendant was convicted."

Appellate proportionality review insures that a particular death sentence is "proportionate to other sentences imposed for similar crimes" and prevents arbitrary and capricious capital sentencing. Harris v. Pulley, 692 F.2d at 1196. No particular state court procedure is required.

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[5]The Sentence Review Division is composed of three sitting state trial judges. MCA § 46-18-901 (1981). Its function is to determine the appropriateness of criminal sentences within the minimum and maximum ranges set by law, reviewing sentences for "equity, disparity, or considerations of justice." State v. Stephens, 645 P.2d 387, 390 (Mont. 1982).

Irving v. Hargett, 518 F.Supp. 1127 (E.D. Tex. 1981). This Court agrees with the finding of the Sentence Review Board and the Montana Supreme Court, McKenzie v. Osborne, 640 P.2d 368, 381 (Mont. 1981), that petitioner is under a sentence that is not disproportionate to sentences that have been imposed in similar cases. In any case, the Eighth Amendment does not require as an invariable rule that there be comparative proportionality review in capital cases. Pulley v. Harris, 104 S.Ct. 871 (1984).

A further reason exists to deny plaintiff relief on this issue. Petitioner was convicted of an offense involving a brutal murder of an innocent victim. Given the depravity of this offense, "[i]t is doubtful that any conceivable method of proportionality review would show the death penalty here to be excessive or to have been arbitrarily or capriciously imposed." Baldwin v. Blackburn, 653 F.2d 942, 953-54 (5th Cir. 1981).

No evidentiary hearing is required on this issue. The record demonstrates that the state courts afforded adequate appellate review. For the foregoing reasons, petitioner's claim in Paragraph 23 is without merit. The respondent is therefore entitled to summary judgment on the claim.

Substantive Proportionality (¶ 24)

Petitioner asserts that his death sentence is unconstitutional because the jury may have convicted him of the offenses of deliberate homicide and aggravating kidnapping without a finding that he intentionally murdered Lana Harding.

Petitioner argues that Edmund v. Florida, 102 S.Ct. 3368 (1982), supports his position. Petitioner errs. Edmund does not hold that the death penalty may never be imposed under a felony murder statute. If, as petitioner asserts, the Supreme Court had considered the nature of the charge alone to be dispositive, the Court's extensive discussion of the evidence against Edmund would have been unnecessary. Edmund leaves open the possibility that a person convicted under a felony murder theory, such as petitioner, may receive a death sentence if the evidence shows that he deliberately took a life. Moreover, Edmund involved a defendant who at most planned a robbery and drove the getaway car; here, petitioner directly caused the death of his victim.

A finding by the sentencing judge that the defendant intentionally killed his victim, which occurred here, satisfies the constraints set forth in Edmund. The death sentence may properly be based on felony murder without a specific finding of intent to kill. Adams v. Wainwright, 709 F.2d 1443, 1446-47 (11th Cir. 1983). In any case, evidence clearly supports the finding of the sentencing judge, affirmed by the Montana Supreme Court, that the petitioner intentionally killed Lana Harding. The facts as found by the jury leave no doubt that petitioner intentionally murdered his victim. See, Sandstrom Instruction (¶ 20) supra.

For the foregoing reasons, the claim in ¶ 24 of the petition must fail. Respondent is therefore entitled to summary judgment on this claim.

Mitigation of Sentence (¶ 25)

Petitioner asserts that his death sentence is unconstitutional because the trial judge failed to consider his impaired mental condition as a mitigating circumstance.

A sentencing court must consider mental disease if a defendant offers it in mitigation of capital punishment. Eddings v. Oklahoma, 102 S.Ct. 869 (1982). Among the mitigating circumstances argued by petitioner at sentencing was the fact that he suffered from a mental disease which produced his unlawful conduct. This argument was rejected by the trial jury. The record in this case explicitly shows that the sentencing judge did consider the evidence of mental disease in detail. Sentencing Report Finding of Facts No. 5 and No. 8. Furthermore, the Montana Supreme Court found that the sentencing court properly weighed the mitigating circumstances and found them insufficient to justify leniency; this finding is binding on this Court. Sumner v. Mata, 449 U.S. 539, 546-47 (1981).

The language of the death penalty statute, "unless there are mitigating circumstances," required a weighing of aggravating and mitigating circumstances, not a sentence less than death if any mitigating circumstance was present. McKenzie IV at 381. The Montana Supreme Court's reading of the sentencing statute is conclusive. Because the record shows that the trial judge considered mental disease as a mitigating fact, petitioner's claim in ¶ 25 is without merit. Respondent is entitled to summary judgment on this claim.

Vagueness of Torture Definition (¶ 26)

Petitioner asserts that his death sentence was imposed in violation of his constitutional rights because it was based upon a finding of the aggravating factor of "torture", which is unconstitutionally vague and fails to sufficiently guide sentencing discretion.

The jury was instructed as to the meaning of "torture." That instruction was approved by the Montana Supreme Court as a correct statement of Montana law. McKenzie III at 445. The Court notes that the instruction given to the jury was not materially different from an instruction defining "torture" proposed by petitioner. See Defendant's Proposed Instruction No. 45. Defendant's proposed instruction was taken directly from the same California case relied on by the trial court in giving its instruction, which was cited with approval by the Montana Supreme Court. McKenzie III at 445. Both instructions require a finding that the defendant intentionally inflicted suffering on the victim and that the victim died as a result.

Petitioner cites Godfrey v. Georgia, 446 U.S. 420 (1980), as support for his position that the definition of "torture" given to the jury was unconstitutionally vague. Godfrey does not support such a claim. In Godfrey, the sentencing jury was not instructed on the meaning of the terms used in the statutory aggravating circumstances, which included torture. As a result, the sentencing jury had virtually unlimited discretion in determining whether the aggravating circumstances applied. Here, the term "torture"

was defined for the jury. Evidence supported the jury's finding that Lena Harding was tortured. Because the definition of "torture" provided meaningful guidance to the jury in determining that this particular murder was materially more depraved than a typical murder, it cannot be found to be unconstitutionally vague. The respondents therefore are entitled to summary judgment on the claim in ¶ 26.

Burden of Proof (¶ 27)

Petitioner claims that his death sentence was imposed under statutory procedures that violated his constitutional rights because it improperly placed the burden of persuasion on petitioner to show that his life should be spared by establishing mitigating circumstances.

The death penalty became an issue in this case only after the prosecution had proved to the jury beyond a reasonable doubt that the two statutory aggravating circumstances were present.[6] The initial burden of justifying the death penalty was thus on the prosecution, not on the petitioner. Although the prosecution has the burden to establish the aggravating factors beyond a reasonable doubt, it is the burden of petitioner to come forward in sentencing with evidence of mitigation. In Richmond v. Cardwell, 450 F.Supp. 519, 594-95 (D. Ariz. 1978), the court held that the Constitution is not offended by death penalty statutes that place the burden of producing evidence in mitigation of sentence on the defendant. This procedure is constitutional under Harris

[6]Petitioner was sentenced to death on both deliberate homicide by means of torture and aggravated kidnapping.

v. Pulley, 692 F.2d at 1194. For the reasons cited above respondent is entitled to summary judgment on this issue.

Jury Sentencing (¶ 28)

Petitioner asserts that the Constitution requires jury participation in every sentence of death, and that the lack of such jury participation requires that his death sentence be vacated.

No reported authority supports petitioner's claim. It has never been held that the Constitution requires jury sentencing. Proffitt v. Florida, 428 U.S. 242, 252 (1976). Although not required, the jury in this case participated in sentencing to the extent that it found the statutory aggravating factors beyond a reasonable doubt. Here, the jury's verdict was a necessary predicate to the capital sentence. Any minimum standard of jury participation would be met by that finding. Respondent is entitled to summary judgment on this claim.

Fact Basis for Sentences (¶ 29)

Petitioner argues that his death sentences were imposed in violation of his constitutional rights in that the death sentences were based on erroneous factual findings unavailable to petitioner and imposed without an opportunity to rebut the information considered by the trial court. Although the trial judge did prepare his sentencing order before the March 3, 1975, sentencing hearing, the petitioner had an opportunity to present arguments and evidence in mitigation prior to that time via his "Petition and Motion in Mitigation." That motion explicitly recognized in paragraph 7

that the trial court had "advised the defendant that it is receptive to, and will hear, any matter in mitigation." At the beginning of the sentencing hearing, defendant's counsel indicated that the defense "would rest upon what is said in the Petition and Motion in Mitigation and not swear any witnesses, or present to this court any evidence . . . ." Transcript at 2611: 21-24. The record clearly disputes petitioner's argument that the trial court was unreceptive to mitigating evidence.

Petitioner's challenge to the presentence report also fails. Counsel for petitioner objected to items in the presentence report identified as hearsay and gossip. The trial judge responded that hearsay items were not considered and that the findings were based solely on the facts of the record. Transcript at 2613: 10-12. Because the trial judge did not rely on inadmissible hearsay in imposing sentence, the error sought to be identified by petitioner does not exist. The Supreme Court has expressly recognized that the presence of a contested matter in a presentence report in a capital case is not reversible per se when the trial judge expressly disregards the material. Cardner v. Florida, 430 U.S. 349 (1977). Here, the trial judge opened the entire report for inspection by defense counsel and expressly eliminated reliance on the contested information. Moreover, the entire presentence report was considered by the Montana Supreme Court in its full review of the factual basis for petitioner's sentence.

Petitioner claims inaccuracy in the items of fact in the sentencing order. He cites two errors. First, he alleges that the sentencing order indicates a finding that the petitioner was convicted of rape, despite the fact the jury returned no verdict on a rape charge. Petitioner errs; the sentencing order accurately recites the offenses of which petitioner was convicted. The order contains only two mentions of "rape", neither of which reflects a belief by the trial judge that the jury had convicted the petitioner of rape; rather, "rape" is used as a shorthand factual description of the events leading to the death of Lana Harding. The evidence clearly supports the conclusion that the petitioner had forcibly sexually assaulted Lana Harding. Transcript at pages 601-04, 607-13, 1752-53, 2054-56.

The second error alleged by petitioner is the trial judge's interpretation that petitioner's parole eligibility date under a sentence of 100 years, the statutory maximum if the death penalty was not imposed, would be parole in 12½ years less "good time." This is an accurate statement of the law; there is no error. RCM 1947 § 95-3214 (Supp. 1974).

Petitioner was given a fair opportunity to present evidence in mitigation of his sentence. A review of petitioner's allegations, authorities cited, and the voluminous record convinces this Court that the sentencing order was proper. No evidentiary hearing is therefore necessary on this issue. The respondent is entitled to judgment as a matter of law on this claim.

Plea Bargaining (¶ 30)

Because an evidentiary hearing will be necessary to determine the existence of a claimed plea bargain, the Court reserves ruling on this claim.

Imposition of Capital Punishment (¶ 31)

Petitioner alleges that his death sentences were imposed in violation of his constitutional rights because the death penalty has been applied arbitrarily and discriminatorily in Montana.

There have been no executions in the State of Montana since 1943. Since 1974, four persons have been sentenced to death in the State of Montana. Petitioner was the only person sentenced to death under the 1974 Montana Capital Punishment Law.

Petitioner's argument is an allegation that the basic assumption underlying the Supreme Court's decisions in Gregg, Proffit and Jurek is incorrect. Those cases stand for the proposition that a death penalty procedure conforming to the approved guidelines eliminates arbitrary death sentences. In Montana, the death penalty has been applied in a class of cases involving the most aggravated kinds of homicide and aggravated kidnapping. See Coleman, 605 P.2d at 1021; State v. Fitzpatrick, 606 P.2d 1343, 1360-63, cert. denied, 101 S.Ct. 252 (1980). This Court therefore finds that the enactment of a death penalty scheme that complies with Gregg conclusively eliminates the possibility of arbitrary and capricious sentencing. See Spinkellink v. Wainwright, 578 F.2d 582 (1978), cert. denied sub nom. 440 U.S. 976 (1979).

The reviewing court need only inquire as to whether the state has a valid death penalty law and whether it followed the statute in imposing penalty; if the answer to these two questions is affirmative, the arbitrariness and capriciousness have been conclusively removed. Spinkellink, 578 F.2d at 605. This Court finds Montana's 1974 Capital Punishment law conforms with Supreme Court guidelines and was properly applied in petitioner's case. Thus, as a matter of law petitioner's claim is insufficient and the respondent is therefore entitled to summary judgment without a hearing on the issue.

Equal Protection in Sentencing (¶ 32)

Petitioner asserts that the death penalty is disproportionately imposed against poor males who kill Caucasians and thus, the imposition of capital punishment violates equal protection guarantees.

The Supreme Court has ruled that a showing that a state policy that impacts one racial group more than another, without more, will not result in a per se finding that the policy denies equal protection of the law. City of Memphis v. Greene, 451 U.S. 100, 119 (1981); Spinkellink, 578 F.2d at 615. Petitioner does not allege discriminatory intent. Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983). Petitioner's equal protection argument is insufficient as a matter of law and respondent is therefore entitled to summary judgment on the claim.

Valid State Purpose (¶ 33)

Petitioner argues that regardless of the statutory scheme the death penalty is unconstitutional because it is infrequently imposed. This argument must fail. The Supreme Court found two social purposes served by capital punishment, "retribution and deterence of capital crimes by prospective offenders." Gregg, 428 U.S. at 183. Either of these purposes support the Montana Legislature's decision to create a capital punishment procedure. Mere allegation of delay and infrequency is legally insufficient to demonstrate that the death penalty is inadequate for purposes of retribution. In any case, the legislature is the proper forum to evaluate that issue. Gregg, 428 U.S. at 186. Petitioner's argument fails as a matter of law and the respondent is therefore entitled to summary judgment on this claim.

CONCLUSION

This Court has given thorough consideration to the 17 claims ripe for decision presented by petitioner's request for the great writ.[7] It is apparent from the 2600 page trial transcript that McKenzie had less than a perfect trial. The law, reflecting an understanding of humanity and human institutions, does not require a perfect trial--the law requires a fair trial that preserves the rights of the criminal defendant. Bruton v. United States, 391 U.S. 123, 135 (1968). Duncan Peder McKenzie received a fair trial that preserved

[7]Petitioner has withdrawn claim ¶ 17. Respondent did not move for summary judgment on Claims ¶¶ 13, 19, 34. The Court reserves ruling on claim ¶ 30.

his legal rights. Based on the claims considered herein, the jury properly found McKenzie guilty of deliberate homicide by means of torture and aggravated kidnapping and the trial judge properly sentenced McKenzie to death.

An order conforming to the decisions of this opinion will issue.

Done and dated this 24th day of July, 1984.

James F. Battin
Chief Judge

APPENDIX

The following documents were examined and considered by the Court in evaluating petitioner's habeas corpus claims:

1) Trial transcript, pp. 1-2623. (Includes preliminary hearing, arraignment, settlement of preliminary instructions, and motions, voir dire, opening statements, offer of proof, and examination of witnesses.)

2) Itemized list of proceedings in state court involving petitioner.

3) Transcript of spectator's tape recording of closing arguments of counsel at petitioner's trial.

4) Transcript of September 3, 1974, and September 30, 1974, hearings on pretrial motions.

5) Supplemental transcript of September 3, 1974, and September 30, 1974, hearings on pretrial motions.

6) Transcript of proceedings before the Montana Sentence Review Board.

7) Transcript of proceedings in state district court and petitioner's state post-conviction proceedings.

8) State's brief in McKenzie I; Appellant's [McKenzie's] brief and reply pp. 1-515.

9) State's brief in McKenzie II; Appellant's [McKenzie's] brief and reply.

10) State's brief in McKenzie III; Appellant's [McKenzie's] brief and reply.

11) State's brief in McKenzie IV; Appellant's [McKenzie's] brief.

12) Copies of Petition for Supervisory Control and briefs in State ex rel. McKenzie v. District Court, 165 Mont. 54, 525 P.2d 1211 (1974).

13) Transcript of December 30, 1974, pretrial hearing.

14) Copies of Petition for Supervisory Control and briefs in State ex rel. McKenzie v. District Court, 165 Mont. 300, 529 P.2d 1407 (1974).

15) Copies of Petition for Supervisory Control and briefs in State ex rel. McKenzie v. District Court, 172 Mont. 555, 560 P.2d 910 (1977).

16) Transcript of August 5, 1974, hearing on Motion to Change Venue.

17) Transcript of May 20, 1974, pretrial hearing.

18) Supplemental transcript of February 19, 1974, pretrial hearing.

19) Affidavit and application for search warrant.

20) Search warrant.

21) Return of search warrant.

22) Motion to suppress.

23) Order denying motion to suppress.

24) Letter dated August 6, 1974.

25) Letter dated August 20, 1974.

26) Demand and Motion for Production of Statements.

27) Motion to Endorse Additional Witnesses.

28) Motion for Protective Order.

29) Notice.

30) Order Committing Petitioner for Examination.

31) Report of Dr. M. F. Gracia.

32) Motion for Bifurcated Trial.

33) Order regarding mental examination at trial.

34) Report of Dr. R. Wetzler.

35) Defense subpoena for Fred Edwards.

36) Jury Instructions.

37) Decision of Sentence Review Board.

38) Sentencing Order.

39) Defendant's Proposed Instruction No. 45.

40) Petition and Motion in Mitigation.

41) Presentence Report with attachments.

In addition to an examination of the documents identified above, the Court has thoroughly examined the reported McKenzie opinions.

APPENDIX C

NOT FOR PUBLICATION

FILED

MAY 10 1988

CATHY A CATTERSON CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DUNCAN PEDER McKENZIE, JR.,	)	No. 85-4156
	)	
Petitioner-Appellant,	)	D.C. No.
	)	CV-81-170-GF
-vs-	)	
	)	
HENRY RISLEY, et al.,	)	ORDER
	)	
Respondents-Appellees.	)	

Appeal from the United States District Court
for the District of Montana

Before: WALLACE, FLETCHER, FARRIS, PREGERSON, ALARCON, CANBY, NORRIS, WIGGINS, BRUNETTI, KOZINSKI, and O'SCANNLAIN, Circuit Judges.

A majority of the en banc court having voted to deny the petition for rehearing,

THE PETITION FOR REHEARING IS DENIED.

APPENDIX D

REVISED CODES OF MONTANA, 1947

94-5-101. Criminal homicide. (1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

2. Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.

94-5-102. Deliberate homicide. (1) Except as provided in section 94-5-103(1)(a), criminal homicide constitutes a deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnaping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in section 94-5-105, or by imprisonment in the state prison for any term not to exceed one hundred (100) years.

94-5-105. Sentence of death for deliberate homicide. (1) When a defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:

(a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or

(b) The defendant was previously convicted of another deliberate homicide; or

(c) The deliberate homicide was committed by means of torture; or

(d) The deliberate homicide was committed by a person lying in wait or ambush; or

(e) The deliberate homicide was committed as part of a scheme or operation which, if completed, would result in the death of more than one person.

(2) Notwithstanding the provisions of subsection (1) and regardless of circumstances, when a defendant is convicted of the offense of deliberate homicide under subsection (1) (a) of section 94-5-102 in which the victim was a peace officer killed while performing his duty the court shall impose a sentence of death.

94-5-303. Aggravated kidnaping. (1) A person commits the offense of aggravated kidnaping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) A person convicted of the offense of aggravated kidnaping shall be punished by death as provided in section 94-5-304, or be imprisoned in the state prison for any term not to exceed one hundred (100) years unless he has voluntarily released the victim alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

94-5-304. Sentence of death for aggravated kidnaping. A court shall impose the sentence of death following conviction of aggravated kidnaping if it finds that the victim is dead as the result of the criminal conduct unless there are mitigating circumstances.

94-2206.1 Sentence of death. When a person is convicted of an offense punishable by death or imprisonment, the court may sentence the offender to death or imprisonment.

94-2212. Sentence to be imposed by judge. All sentences under this chapter shall be imposed exclusively by the judge of the court.

95-505. Psychiatric examination of defendant with respect to mental disease or defect. (a) Whenever the defendant has filed a notice of intention to rely on the defense of mental disease or defect excluding responsibility, or there is reason to doubt his fitness to proceed, or reason to believe that mental disease or defect of the defendant will otherwise become an issue in the cause, the court shall appoint at least one (1) qualified psychiatrist or shall request the superintendent of the Montana state hospital to designate at least one (1) qualified psychiatrist, which designation may be or include himself, to examine and report upon the mental condition of the defendant. The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period of not exceeding sixty (60) days or such longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist retained by the defendant be permitted to witness and participate in the examination.

(b) In such examination any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect.

(c) The report of the examination shall include the following:

(1) A description of the nature of the examination;

(2) A diagnosis of the mental condition of the defendant;

(3) If the defendant suffers from a mental disease or defect, an opinion as to his capacity to understand the proceedings against him and to assist in his own defense;

(4) When a notice of intention to rely on the defense of irresponsibility has been filed, an opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the criminal conduct charged; and

(5) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

If the examination cannot be conducted by reason of the unwillingness of the defendant to participate therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect.

The report of the examination shall be filed (in triplicate) with the clerk of court, who shall cause copies to be delivered to the county attorney and to counsel for the defendant.

95-507. Determination of irresponsibility on basis of report--access to defendant by psychiatrist of his own choice--form of expert testimony when issue of responsibility is tried. (a) If the report filed pursuant to section 95-505 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect which rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, and the court, after a hearing if a hearing is requested by the attorney prosecuting or the defendant, is satisfied that such mental disease or defect was sufficient to exclude responsibility, the court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

(b) When either the defendant or the state wishes the defendant to be examined by a qualified psychiatrist or other expert, selected by the one proposing the examination, such examiner shall be permitted to have reasonable access to the defendant for the purpose of such examination.

(c) Upon the trial, any psychiatrist who reported pursuant to section 95-505 may be called as a witness by the prosecution or by the defense. If the issue is being tried before a jury, the jury shall not be informed that the psychiatrist was designated by the court or by the superintendent of the Montana state hospital. Both the prosecution and the defense may summon any other qualified psychiatrist or other expert to testify, but no one who has not examined the defendant shall be competent to testify to an expert opinion with respect to the mental condition or responsibility of the defendant, as distinguished from the validity of the procedure followed by, or the general scientific propositions stated by another witness.

(d) When a psychiatrist or other expert who has examined the defendant testifies concerning his mental condition, he shall be permitted to make a statement as to the nature of his examination, his diagnosis of the mental condition of the defendant at the time of the commission of the offense charged and his opinion as to the ability of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law or to have a particular state of mind which is an element of the offense charged. He shall be permitted to make any explanation reasonably serving to clarify his diagnosis and opinion and may be cross-examined as to any matter bearing on his competency or credibility or the validity of his diagnosis or opinion.

APPENDIX E

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

MI 20F R5907

THE STATE OF MONTANA, Plaintiff, vs. DUNCAN PEDER McKENZIE, JR., Defendant.

Cause No. 6593

FINDINGS, CONCLUSIONS, SENTENCE AND ORDER

MAR

The defendant, Duncan Peder McKenzie, Jr., with his counsel, Barney Regan and Charles L. Jacobson, appeared in open Court this 3rd day of March 1975. The State of Montana appeared by Douglas Anderson, County Attorney, of Pondera County, Montana and David Nelson, who assisted said County Attorney in the prosecution of the action.

The defendant was duly arrested on the 22nd day of January 1974 in Pondera County, Montana, in Connection with the disappearance of Lana Harding. On that day or the day following, counsel Charles L. Jacobson was appointed to represent him by District Judge Ronald McPhillips, and very soon thereafter said Judge appointed counsel Barney Regan to also represent the defendant.

On January 24, 1975 leave was duly granted the State of Montana by said Judge to file an Information charging the defendant with the deliberate homicide of the said Lana Harding. Amended Informations were thereafter duly filed in said cause, and finally pursuant to the decision of the Montana Supreme Court, No. 12797, in cause The State of Montana ex rel Duncan Peder McKenzie,

Jr., vs. The District Court of the Ninth Judicial District of the State of Montana, in and for the County of Pondera, and the Honorable R. D. McPhillips, Judge in said District, the undersigned who was called in to preside when the Hon. R. D. McPhillips was disqualified by the defendant, on September 30, 1974 duly granted leave to the State of Montana to file the Amended Information, on which trial was had.

Further, on September 30, 1974, because defendant had filed on June 6, 1974 an instrument in which the defendant sought an order of the Court requiring the State of Montana to prove beyond a reasonable doubt, not only that the defendant had the requisite mental states for the offenses then alleged against him, but to also prove that he could have had said mental states and giving notice that he would introduce evidence at the trial of the case to the contrary, the undersigned ordered the defendant, under the provisions of Chapter V, Title 95, RCM to the State Hospital for a psychiatric evaluation, seeming from said notice that the defendant intended to raise the defense of disease or defect of the mind excluding responsibility for criminal conduct provided for by said Chapter V, Title 95, RCM, though defendant specifically denied in said notice that he was relying on the provisions of said chapter and title.

The defendant's counsel objected to said order and in open Court advised defendant he was not to participate in said psychiatric evaluation and was not to answer any questions therein or participate in any tests, and by letter thereafter so advised the State

Hospital.

The defendant on November 19, 1974 was returned to the Court from the State Hospital, with a report that from observation, and without the benefit of testing, they could find no evidence that the defendant suffered from a mental disease or defect and was able to understand the proceedings against him and to assist in his defense.

That on December 3, 1974 the undersigned granted a pending motion of defendant's counsel to change the place of trial from Pondera County Montana, and changed the place of trial to the Eighth Judicial District, Cascade County Montana; and by the order granting said change notified the defendant to be prepared to plead to the charges made in the Information filed September 30, 1974.

That the Information filed September 30, 1974 charged the defendant with the following offenses:

A. Deliberate Homicide:

1. Committed knowingly or purposely, or
2. Committed in the commission of a forcible felony, to wit:
   (a) Kidnapping or,
   (b) Sexual Intercourse without Consent, or
   (c) Aggravated Assault, or
3. Deliberate Homicide by Means of torture, or
4. Deliberate Homicide by lying in wait or ambush.

B. Aggravated Kidnapping, to wit:

1. Committed for the purpose of inflicting bodily injury on, or to terrorize the victim,or

2. Committed for the purpose of facilitating the commission of a felony, to wit:
   (a) Sexual Intercourse without consent, or
   (b) Aggravated Assault.

C. Sexual Intercourse Without Consent.

D. Aggravated Assault, to wit:

1. Infliction of serious bodily injury on another, or
2. Infliction of bodily injury on another with a weapon.

On December 17, 1974 defendant appeared in the above entitled Court with his counsel for the entry of pleas to the said charges. The State of Montana was represented by the aforesaid counsel for the State. The defendant was advsied by his counsel to stand mute, and to refuse to plead and when the Court asked the defendant if this was his desire, he stated yes.

Accordingly the Court thereupon entered a plea of not guilty for the defendant to each of said charges as required by law.

Trial to a jury of said defendant on said charge was duly commenced in the above entitled Court on the 8th day of January, 1975.

On the 21st day of January 1975 the Court permitted the defendant after motion by his counsel to add and enter the affirmative defense of Mental Disease or Defect which excludes Responsibility for criminal conduct, and an examination of defendant was had under Court order by a doctor from the State Hospital, a psychologist and a re-examination by defendant's psychiatrist in

accordance with the provisions of said Chapter V, Title 95, RCM.

On the 31st day of January 1975, evidence having been completed, the Court duly instructed the jury and submitted the case to the jury, less the Charge of Deliberate Homicide by lying in wait or ambush, the Court deeming the evidence insufficient to establish that the defendant had purposely concealed himself and lay in wait for the particular purpose of causing the death of the victim.

On the 1st day of February 1975, the defendant and counsel being present in open court, together with the said counsel for the State of Montana, the jury duly returned its verdicts to the Court, to wit:

1. Guilty of Deliberate Homicide and found said homicide was by means of torture.
2. Guilty of Aggravated Kidnapping and found said aggravated kidnapping resulted in the death of the victim.

Verdicts not being required under the law as to the remaining charges, the verdicts returned were accepted by the Court and were duly read and filed in open Court, and were duly affirmed by the jury in all respects when the jury was duly polled as to each verdict, and each of said findings at the request of defendant's counsel.

The Court then ordered a pre-sentence investigation and set the sentencing date for March 3, 1975 at 2:00 o'clock P. M. in said Court.

The defendant was duly advised as to the purpose

of a presentence investigation and of his right to participate therein if he so chose, and was further advised that the Court would grant him a hearing before sentence was pronounced, if he so desired, as to mitigating facts and circumstances.

The defendant was then remanded to the custody of the Sheriff of Pondera County, Montana, and the jury was discharged.

The presentence investigation report ordered has been received and is placed of record in the above action. It has been duly read and considered by the Court.

On this date, March 3, 1975, the Court heard the following motions made by defendant's Counsel:

Motion for a New Trial and Petition and Motion for Mitigation. The Court duly considered both motions and does hereby deny the same.

The Court then asked defendant if he had any other legal cause to show why sentence should not be pronounced and no sufficient cause being shown or appearing to the Court, the Court makes the following Findings, Conclusions, Judgment and Order:

FINDINGS OF FACT

I. That the charges on which the defendant was found guilty; Deliberate Homicide, which was by means of Torture; and Aggravated Kidnapping which resulted in the death of the victim were a part of the same transaction, and though the defendant is guilty of and could be found guilty of both offenses, under the law, he can be sentenced for only the more serious of the

two offenses.

7. That both of the offenses of which the defendant has been found guilty are of equal gravity and seriousness under the law, both being mandatorily punishable by death, unless there are mitigating circumstances.

8. That there is nothing in the evidence of the case, nor in the presentence investigation, nor in the character, nature, or background of the defendant, nor in any other manner presented to the Court which mitigate his conduct or the sentence required by law.

9. The evidence in the case, and as found by the jury discloses a brutal, conscienceless, torture, rape and deliberate killing of a human being.

10. All of the expert witnesses who testified in the case as to defendant's mental state and condition found the defendant had a personality disorder, classified as anti-social, and that the conduct set forth in paragraph numbered 4 of these findings is in keeping with such diagnosis. All agreed that the defendant is dangerous and potentially dangerous. The defendant's psychiatrist testified that the defendant knew right from wrong, but despite this, ability is unable to avoid committing acts such as were charged against him. The experts that testified for the State of Montana agreed that the defendant was and is potentially dangerous and that he could and can distinguish right from wrong, but testified that he could control his conduct if he chose to do so, though his judgment, because of his anti-social personality is somewhat impaired, and that the defendant

chooses his anti-social, dangerous conduct.

6. That the jury rejected the verdict form finding the defendant not guilty by reason of a mental disease or defect which excludes responsibility for criminal conduct which was submitted to them and correctly found the defendant guilty of deliberate homicide which was by means of torture, and guilty of Aggravated Kidnapping which resulted in the death of the victim.

7. That the presentence investigation discloses that the defendant in Blaine County, Montana in 1970 was convicted of an Aggravated Assault on one Barbara Stiffora who was found brutally beaten, clad only in a blouse crawling alongside of a roadway in said County. On the 29th day of December 1970 he was sentenced to three years in the State Prison for said assault. Early in July of 1971 after serving a few days over six months of his sentence he was paroled as safe to be at large in society. He was returned to the State Prison in December of 1971 after numerous parole violations. In 1972 he was again paroled as being safe to be at large in society. That his parole on the said three year sentence expired in October of 1973 approximately three short months before January 21, 1974, the date of the rape torture, kidnapping and killing of Lana Harding of which the defendant has been found guilty.

8. That the prognosis for change in and rehabilitation of persons with anti-social personality disorders such as defendant's is so unlikely and minimal as to be practically non-existent.

9. That the defendant must never be allowed to be free in and endanger society again. That under existing Montana Statutes on sentencing the maximum sentence other than death is 100 years imprisonment. Under existing Montana Statutes the defendant under a 100 year imprisonment sentence would automatically be eligible for parole in 12 1/2 years less good time allowances. Under existing Montana Statutes regulating good time allowances the 12 1/2 years could and would be cut so that the defendant would only be required to service approximately seven years of the 100 year sentence before he would be turned loose to menace society again, and this would be true even though his sentence was not reduced by the Sentence Review Board or by future executive clemency.

CONCLUSIONS OF LAW

1. The offenses of which the defendant has been found guilty are of equal gravity before the law and result from the same transaction, and therefore only one sentence may be imposed though he was found guilty of two offenses.

2. That there are no circumstances which mitigate the defendant's conduct or the sentence to be imposed.

3. That sentences must be based on prevention and rehabilitation of offenders. That rehabilitation of Duncan Peder McKenzie, Jr. is not possible under existing law and the protection of society and the law requires and justifies the imposition of the death penalty in this case

9.

JUDGMENT AND DECREE

In accordance with the foregoing Findings and Conclusions it is hereby adjudged and decreed:

1. That under the provisions of Section 94-5-105 subsection 2. and Section 94-5-304 R.C.M. the death penalty is hereby imposed on the defendant.

2. That under the provisions of Section 95-2303 RCM the defendant Duncan Peder McKenzie, Jr. be hanged by the neck until he is dead, on the 30th day of April 1975 in Pondera County, Montana, by the Sheriff of said County in accordance with the provisions of said Section 95-2303 RCM and as provided by said section.

ORDER

The defendant Duncan Peder McKenzie, Jr., is hereby remanded to the custody of the Sheriff of Pondera County, Montana to carry out the judgment of this Court as provided herein and by said Section 95-2303 RCM.

DATED this 3rd day of March 1975 in open Court.

R. J. Nelson
District Judge

cc:

10.